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No. .....

In The
Supreme Court of the United States
October Term, 1986

JAMES G. LEDBETTER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE GEORGIA DEPARTMENT OF HUMAN RESOURCES,

Appellant,

v.

VERNITA BALDWIN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

(1) Whether the district court erred in holding that 42 U.S.C. § 602(a)(38), which requires that all children and their income be included in determining eligibility of the family unit for AFDC benefits, works a "taking" of the property of appellee child support recipients.

(2) Whether the district court erred in holding that 42 U.S.C. § 602(a)(38) abridges the substantive due process rights of appellee child support recipients.

PARTIES TO THE PROCEEDINGS

James G. Ledbetter is the Commissioner of the Georgia Department of Human Resources. Otis R. Bowen is the Secretary of Health and Human Services who was substituted for the original federal defendant Margaret Heckler. The plaintiffs in this action are Vernita Baldwin and her minor children, Wilnetta Baldwin, Lapheitta Baldwin and Schlonda Baldwin. The plaintiff-intervenors are Brenda Maffett and her minor children, Tanya Maffett, Herley Maffett, Jermaine Maffett, Regina Maffett, and Melissa Maffett. These respondents brought this action as a class action of similarly situated applicants for and recipients of Aid To Families With Dependent Children (AFDC).

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JAMES G. LEDBETTER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE GEORGIA DEPARTMENT OF HUMAN RESOURCES,

Appellant,

v.

VERNITA BALDWIN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

Appellant James G. Ledbetter, in his official capacity as Commissioner of the Georgia Department of Human Resources, appeals to this Court from the Final Order and Judgment entered in this action on October 17, 1986, by the United States District Court for the Northern District of Georgia (App. A, *infra,* A1-A37). Appellant also appeals the oral modification of the order announced by the district court on October 22, 1986, and reduced to an order filed November 18, 1986 (App. D, *infra,* A43-A46). This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101. In its order entered October 17, 1986, the

court held 42 U.S.C. § 602(a)(38) to be unconstitutional. Direct appeal therefore is appropriate to this Court pursuant to 28 U.S.C. § 1252. This jurisdictional statement is submitted to show that the Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The decision of the district court is unreported and is reprinted in the Appendix. (App. A, *infra,* A1-A37). An order modifying this order dated November 18, 1986, is unreported and is reprinted in the Appendix attached hereto. (App. D, *infra,* A43-A46). The court's order denying Appellant's Motion for Stay Pending Appeal is unreported and is reprinted in the Appendix. (App. F, *infra,* A75-A81).

JURISDICTION

The judgment of the district court for the Northern District of Georgia was entered on October 17, 1986, the same day on which the court issued its final order. (App. A, B, *infra,* A1-A39). Notice of appeal to this court was timely filed in the district court for the Northern District of Georgia on November 13, 1986. (App. C, *infra,* A40-A42).

This appeal is being docketed within sixty days of the November 13, 1986, notice of appeal. The jurisdiction of this court is invoked under 28 U.S.C. § 1252 which author-

izes a direct appeal to this Court from a judgment of a court of the United States holding an act of Congress unconstitutional. The United States was a party below and suit was brought pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1, United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C. § 602(a)(38) provides in pertinent part that a state must:

> (38) provide that in making the determination under paragraph (7) with respect to a dependent child and

applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j), in the case of benefits provided under Title II).

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STATEMENT OF THE CASE

This case involves a challenge by appellees to regulations promulgated by the Georgia Department of Human Resources in compliance with § 2640(a) of the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 1145 (1984) (codified at 42 U.S.C. § 602(a)(38)) and implementing federal regulations found at 45 C.F.R. § 206.10 (a)(1)(vii)(B). Appellees were required by 42 U.S.C. § 602(a)(38) to include their children who received child support income in their public assistance grant group along with their other children who were already receiving assistance payments. In the court's order issued October 17, 1986. the court found that because § 602(a)(38) effects a taking without just compensation and abridges the substantive due process rights of the appellees who receive child support, the statute was unconstitutional.

The district court enjoined appellant from enforcing the regulations implementing this statute. (App. A, *infra,* A33-A34).

The facts in this case are not in dispute. The facts as to the application of 42 U.S.C. § 602(a)(38) to the named appellees are adequately set out in the district court's order. (App. A, *infra,* A1-A6). These facts reveal that the Baldwin family sustained a decrease in total family income after implementation of 42 U.S.C. § 602 (a)(38) from $374 per month to $314 per month. However, appellees Wilnetta and Lapheitta Baldwin received the benefits of the state's child support enforcement program (see 42 U.S.C. §§ 602(a)(27), 651 *et seq.*) and received Medicaid benefits. *See* 42 U.S.C. § 1396a(10) (App. A, *infra,* A19). The facts concerning appellee Brenda Maffett and her children show that the Maffett family did not sustain any decrease in family income as a result of the application of 42 U.S.C. § 602(a)(38). The child included in the Maffett family's AFDC grant also receives child support enforcement services and Medicaid benefits. (App. A, *infra,* A19).

Appellant filed his Motion For Stay of Judgment Pending Appeal before the United States District Court for the Northern District of Georgia on October 31, 1986. (App. E, *infra,* A47-A74). Appellant requested an order staying enforcement of the court's original order pending resolution of the case upon appeal. Appellant further requested a stay from the court's order entered orally on October 22, 1986, and reduced to writing by order entered November 18, 1986. (App. D, *infra,* A43-A46). A copy of

the Motion with exhibits made to the district court is reprinted in the Appendix. (App. E, *infra*, A47-A74). In an order entered November 25, 1986, the district court denied Appellant's Motion For Stay of Judgment Pending Appeal. (App. F, *infra*, A75-A81).

Appellant filed an application for stay on appeal to the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit. The application was filed December 11, 1986, and is reprinted in the Appendix. (App. G, *infra*, A82-A107). A temporary order staying the judgment of the district court for the Northern District of Georgia was entered December 12, 1986. (App. H, *infra*, A108). After considering the response of Appellees, a stay was issued pending resolution of the case in this Court on December 18, 1986. (App. I, *infra*, A109-A112).

STATUTORY AND REGULATORY BACKGROUND

Appellant James G. Ledbetter is the Commissioner of the Georgia Department of Human Resources. The Department through its Division of Family and Children Services, administers the Aid To Families With Dependent Children (AFDC) program in the State of Georgia. The AFDC program is a joint federal and state program created by the enabling federal statute found at Title IV, part A of the Social Security Act, codified at 42 U.S.C. § 601 *et seq.* States which choose to participate in the program must operate their AFDC programs in a manner

consistent with the federal statute. *Rosado v. Wyman,* 397 U.S. 397, 408 (1970).

The statute in question in this litigation is part of the federal statute which prescribes what the state must assure in its state plan which is found at 42 U.S.C. § 602. This provision was enacted by Congress as § 2640(a)(38) of the Deficit Reduction Act of 1984, codified at 42 U.S.C. § 602 (a)(38). The provision is frequently referred to as the "standard filing unit" or "family filing unit" provision.

42 U.S.C. § 602(a)(38) provides that the State in its state plan must:

> (38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j), in the case of benefits provided under Title II).

The federal and state regulations in the AFDC program implement this requirement. *See* 49 Fed. Reg. 35586, 35599, September 10, 1984, to be codified at 45 C.F.R. § 206.10(a)(1)(vii); Georgia Department of Human Resources County Letter 84-44. (App. A, *infra,* A4-A5).

The effective date of § 602(a)(38) was October 1, 1984. Prior to that date, a recipient of AFDC benefits could choose which children would be brought into the AFDC grant group to receive benefits. Under this previous policy, a mother could receive AFDC on behalf of herself and, for example, two children, while excluding from the group a third child who also resided in the household but who was receiving some type of income, for example, child support. In so doing, the family could maximize its benefits, since the income of the excluded child was not computed in the family's income in considering the AFDC grant. 42 U.S.C. § 602(a)(38) changed the previous policy by requiring all parents and siblings living in the same household with an eligible AFDC recipient to be included, along with any available income, in the grant group so that a determination could be made regarding the eligibility of the entire household for AFDC benefits. In implementing this regulation, Congress intended to treat the income of all members of the household as available to the AFDC recipients, thereby requiring the family to use income available to it as its primary resource rather than public welfare benefits. S. Rep. No. 169, 98th Cong., 2d Sess. 908 (1984).

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THE QUESTION IS SUBSTANTIAL

The question of the constitutionality of 42 U.S.C. § 602 (a)(38) is a substantial question for the State of Georgia, as well as for all states participating in the AFDC program. Section 602(a)(38) became effective on October 1, 1984. Since that time, the rule has effected many AFDC cases

in Georgia and in other states. Because the statute is an important part of the AFDC eligibility requirements, the states have an important interest in a final resolution of the constitutionality of this provision.

The district court's judgment in this case holding a federal statute unconstitutional presents substantial questions of federal law. The order of the district court prevents the implementation of an important congressional policy. The standard filing unit rule not only implemented the congressional purpose of reducing expenditures of public assistance, but it also served other purposes. By targeting funds to those most in need, Congress intended to achieve a reduction in public spending while also recognizing the reality that families generally combine resources and share expenses. Therefore, if the decision of the district court is allowed to stand unreviewed, important objectives of Congress will be thwarted.

On December 8, 1986, this Court noted probable jurisdiction in the case of *Gilliard v. Kirk*, No. 86-509. The *Gilliard* case involves the same statute as is involved in this case. In *Gilliard*, the Western District of North Carolina held 42 U.S.C. § 602(a)(38) unconstitutional on the grounds that the statute created an unconstitutional "taking" of the property of children who are required by the statute to be brought into the AFDC grant group.[1]

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[1]A jurisdictional statement was also filed in the case of *Lesko v. Bowen*, No. 86-415, on September 12, 1986 from the decision of the Western District of Wisconsin, holding 42 U.S.C. § 602(a)(38) unconstitutional.

In the current case, as in the *Gilliard* case, the district court held the standard filing unit statute unconstitutional on the grounds of an unconstitutional "taking" of property in violation of the Fifth Amendment. In the current case, the court also focused on an independent ground for holding the statute unconstitutional. The court found that the statute abridged the substantive due process rights of appellees under the Fifth and Fourteenth Amendments. In holding the statute unconstitutional, both under the taking clause and as a matter of substantive due process, the district court committed a significant error of law which should be considered by this court on appeal. On the substantive due process issue, the district court's focus was different from that in *Gilliard*. The court focused upon "right of privacy" cases and found that the interest of the child, not only in the financial support but also in the nurturing of his absent parent, constituted a liberty interest protected by the due process clause.

A. The District Court Erred On The "Taking" Issue.

In addressing the "taking" issue, the district court held that the appellees who were child support recipients had a property interest in the receipt of child support and suffered a diminution in the value of that property interest. In the view of the district court, the sub-class of appellees who receive child support have a property right in those child support payments. (App. A, *infra*, A12-A13). The court analyzed the diminution in value which actually occurred in the case of the Baldwin family and found a nine dollar per month diminution in value of appellees Wil-

netta and Lapheitta Baldwin's child support. (App. A, *infra,* A15). The court went on to hold that this nine dollar diminution in value amounted to an unconstitutional "taking" of the property of these children. The court determined that this "taking" was without just compensation, and ruled that "Defendants may not enforce the amendment [42 U.S.C. § 602(a)(38)] without compensating such child support recipients in cash." (App. A, *infra,* A19).

Appellant submits that the analysis of the district court under the takings clause is an erroneous interpretation of that provision. Assuming that property rights of appellees are implicated, the family filing unit rule does not work an unconstitutional taking of their property. In this case, whatever diminution in property value the child support recipients sustain is not a direct eradication of a property right. There is no physical invasion or direct "taking" of property. As this Court has stated, "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government (citation omitted), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).

The prohibition under the takings clause has been:

> [U]nderstood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals.

Omnia Commercial Co. v. United States, 261 U.S. 502, 510 (1923). This Court has consistently recognized the difference between direct and indirect interference with a property right. It is the direct interference with the protected right which is prohibited. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163-165 (1980).

The family filing unit rule does not directly take from any child his child support monies. Whatever effect the rule has on appellees who receive child support is an indirect effect. This indirect and incidental effect on the child's ability to spend his support payments is the type of incidental effect which is not protected under the takings clause. Although a property owner may be deprived of some beneficial use of his property or his full exploitation of the property may be restricted, such incidental invasion upon that property right has been upheld if such public action is justified as promoting the general welfare. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163 (1980). Government regulation always involves the adjustment of private interests for the public good. *Andrus v. Allard,* 444 U.S. 51, 65 (1979).

The family filing unit statute is related to important public concerns. Congress may choose to allocate limited governmental resources among those recipients of governmental benefits who are most needy. *Schweiker v. Hogan,* 457 U.S. 569, 590 (1982).[2] The family filing unit statute was enacted as part of the Deficit Reduction Act. As the

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[2]Although the impact upon individual recipients may be small, the aggregate of these savings over all recipients could result in substantial savings to the overall program.

legislative history of the Act reveals, Congress intended to promote the general welfare by targeting benefits to those most in need. *See* S. Rep. No. 169, 98th Cong., 2d Sess. 908 (1984). In enacting 42 U.S.C. § 602(a)(38), Congress plainly intended that families rely on independent sources of income before using scarce public resources.

Assuming arguendo that the current facts constitute a "taking" of property, just compensation is provided. In several ways, the appellees are compensated for any diminution in value which they sustain. When appellee child support recipients are brought into the grant group, they are required to assign their support rights to the state. 42 U.S.C. § 602(a)(26)(A). After the first fifty dollars of child support is disregarded from the grant, 42 U.S.C. § 602(a)(8)(A)(vi), the remaining payments made by the absent parent go to reimburse the state for public assistance. Through the operation of this assignment, appellees are provided with two benefits. First, their financial support is generated from a constant and stable source, i.e., the state and federal welfare budgets, rather than an absent parent, who may cease payments due to inability or unwillingness to pay. In conjunction with this benefit, the appellees receive the benefit of the state's collection efforts under the child support enforcement program if the absent parent discontinues his payment of support. See 42 U.S.C. §§ 602(a)(27), 651, *et seq.*

In addition to support collection benefits, appellees receive coverage under the Medicaid program by virtue of being included in the AFDC grant group. See 42 U.S.C.

§ 1396(a)(10). This Medicaid coverage could be worth a great deal in the event of serious illness to the recipient child. The support enforcement mechanism and Medicaid coverage provide ample compensation to appellees who are child support recipients for any diminution in property value which they sustain. Therefore, Appellant submits that the district court's order was in serious error on the "taking" issue, justifying full review by this Court.

B. The Decision Of The District Court On The Substantive Due Process Issues Should Be Granted Plenary Review By This Court.

In the district court's order of October 17, 1986, the court found that the standard filing unit statute was violative of the substantive due process rights of appellees. In holding that the liberty interests of appellee child support recipients were violated by § 602(a)(38), the court found that the child had a liberty interest not only in the financial support but also in the nurturing provided by the absent parent. In so holding, the court reasoned that the statute infringed upon the fundamental rights of this class of appellees in a direct and substantial manner and the court therefore applied a heightened level of scrutiny to the standard filing unit amendment. (App. A, *infra*, A28-A31).

Appellant submits that the district court's erroneous decision on the substantive due process issue merits review by this court. In its opinion, the district court relied upon the same line of cases concerning fundamental rights as those discussed by this Court in the case of *Bowers v. Hardwick*, 478 U.S. —, 106 S. Ct. 2841, 92 L. Ed.2d 140 (1986). This Court stated in *Hardwick* that it was not

inclined to take a more expansive view of the Court's authority to discover new fundamental rights imbedded in the due process clause. *Id.* at 148. Although defining new fundamental rights is approached with "great reluctance" by this court, *id.* at 148, the district court admittedly created a new fundamental right never before recognized. (App. A, *infra,* A29). This creation of a new fundamental right by the district court warrants plenary review by this Court.

The *Hardwick* case, although certainly not dealing with the same or similar allegedly fundamental rights as are alleged in the current case,[3] does demonstrate the view which this Court takes of "fundamental rights". This approach is also demonstrated in the recent case of *Lyng v. Castillo,* 477 U.S. —, 106 S. Ct. 2727 (1986). In *Lyng,* food stamp recipients challenged food stamp amendments which required related persons living together to apply as a single household. The Court found that the statutory classification does not directly and substantially interfere with family relationships and therefore did not involve fundamental rights. *Id.* Given this Court's recent pronouncements concerning the Court's reluctance to expand "fundamental rights", the decision by the district court creating a fundamental right to appellees' exclusive use of their child support was a significant deviation from appropriate substantive due process analysis.

In this case, the district court incorrectly imposed a higher level of scrutiny than that generally used in the con-

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[3]In *Hardwick,* this Court found that there was no fundamental right to engage in sodomy.

text of social welfare legislation. Courts generally apply a minimal level of scrutiny for social welfare legislation. *Schweiker v. Hogan*, 457 U.S. 569 (1982); *Schweiker v. Wilson*, 450 U.S. 221 (1981). Social welfare legislation which is rationally related to legitimate governmental objectives is generally upheld by the courts. *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975).

Given that no fundamental rights were involved, the rational relationship test should have been employed by the district court in this case. The current case does not involve the same type of rights as were protected in the "right of privacy" cases relied upon by the district court.[4] The district court characterized this right as the interest of the child in the support and nurturing of the absent parent who pays child support. (App. A, *infra*, A28-A29). Whether these children will lose nurturing and guidance from their noncustodial parent and have fewer contacts with that parent is not only entirely speculative, but it is solely an indirect result, if it occurs at all, of the family filing unit regulation. Even assuming that constitutional rights are

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[4]Those cases dealt with family issues such as right to marry, *Zablocki v. Redhail*, 434 U.S. 374 (1978), and the right to control private decisions concerning procreation. *Carey v. Populations Services, International*, 431 U.S. 678 (1977) (restrictions on sales of contraceptives); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (mandatory maternity leave); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (statute preventing use of contraceptives). *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (housing ordinance restricting occupancy of dwelling to "single family" affecting family living arrangements); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise of religion restricted by compulsory school attendance); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (compulsory school attendance); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (statute prohibiting the teaching of any modern language other than English to any child not beyond eighth grade).

implicated by the family filing unit rule, there is simply no direct and substantial interference with those rights. *See Lyng v. Castillo,* — U.S. —, 106 S. Ct. 2727, 2729 (1986).

In this case where the statutory enactment is rationally related to a legitimate governmental objective, Appellant submits that no violation of substantive due process rights has occurred. Additionally, the effects upon the familial rights in this case are incidental and indirect. Appellant has demonstrated to the Court that this is a substantial legal issue. This Court should note probable jurisdiction to consider the substantive due process issues raised in this case.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court note probable jurisdiction.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VERNITA BALDWIN, on behalf of herself and her minor children, WILNETTA BALDWIN, LAPHEITTA BALDWIN, and SCHLONDA BALDWIN, and all others similarly situated,

Plaintiff,

vs.

CIVIL ACTION
NO. C85-4340A

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources; and OTIS R. BOWEN, M.D., in his official capacity as Secretary of the United States Department of Health and Human Services,

Defendants.

O R D E R

(Filed October 17, 1986)

This action is before the court on cross motions for summary judgment as well as plaintiff's motion for preliminary injunction. Because a ruling on the motions for summary judgment is dispositive of the request for injunctive relief, the cross motions for summary judgment will be addressed first.

I. FINDINGS OF FACT.

Plaintiff challenges regulations governing Georgia's Aid to Families with Dependent Children (AFDC) pro-

gram. The AFDC program was authorized by Title IV-A of the Social Security Act of 1935, 42 USC § 601, *et seq.* This program is a scheme of cooperative federalism intended to provide "financial assistance to needy children and the parents or relatives who live with and care for them . . . ." *Heckler vs. Turner,* — U.S. —, 105 S.Ct. 1138, 1141 (1985). The federal government reimburses a participating state for approximately one-half the cost of the program. 42 USC § 603. The participating state in return must submit a plan for the administration of the program for approval by the Department of Health and Human Services. 42 USC § 602(a) & (b). Defendant James G. Ledbetter, acting as Commissioner of the Georgia Department of Human Resources, is responsible for the local administration of the AFDC program in Georgia, while defendant Otis R. Bowen, acting as Secretary of the Department of Health and Human Services (Secretary), is responsible for promulgating federal regulations governing Georgia's state plan.

The original plaintiffs in this action are Vernita Baldwin and her children, Wilnetta, Lapheitta and Schlonda Baldwin. Plaintiff Schlonda Baldwin is the half-sister of Wilnetta and Lapheitta Baldwin. Prior to October 1, 1984, Ms. Baldwin and Schlonda comprised a family unit eligible for and receiving $174 per month in AFDC benefits. This payment rerpesented the maximum grant allowed by Georgia's payment standard for a family of two with no other income.[1]

Schlonda Baldwin's half-sisters, Wilnetta and Lapheitta Baldwin, were not originally included as part of the AFDC family filing unit. These plaintiffs were supported by child support payments made by their father, Willie

King, pursuant to an agreement approved by the Christians Circuit Court, Hopkinsville, Kentucky, on January 15, 1980. The court approved payments in the amount of $120 per month, but Mr. King voluntarily agreed in 1983 to raise the court-ordered amount to $200 per month. Affidavit of Vernita Baldwin, ¶ 4. Coupled with the $174 in AFDC payments received by Ms. Baldwin and Schlonda, these plaintiffs as a household enjoyed an income of $374 per month prior to October 1, 1984.

The statutory scheme which allowed Ms. Baldwin to exclude Wilnetta and Lapheitta from the AFDC family filing unit was altered in 1984. Section 2640(a) of the Deficit Reduction Act of 1984 (DRA), Pub. L. No. 98-369, 98 Stat. 1145 (1984) (codified at 42 USC § 602(a)(38)), provided in pertinent part:

> That in making the determination under paragraph (7) with respect to a dependant child and applying paragraph (8), the state agencies shall (except as otherwise provided in this part) include—
>
> (A) Any parent of such child, and
>
> (B) Any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 406(a) if such parent, brother, or sister is living in the same house as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family . . . .

This same statutory revision of the Social Security Act also provided that the first $50 of child support payments not be counted as income to the AFDC family filing unit for the purpose of determining eligibility and benefits.

DRA, Pub. L. No. 98-369, section 2640(b)(1), 98 Stat. 1145 (1984) (codified at 42 USC § 602(a)(8)(A)(vi)).

Pursuant to the foregoing statutory authorization regarding the inclusion of co-resident family members in the AFDC family filing unit, the Secretary promulgated the following regulation:

> For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:
>
> . . . .
>
> (B) Any blood-related or adoptive brother or sister.

45 C.F.R. § 206.10(a)(1)(vii)(B). Defendant Ledbetter in turn sent a letter to county directors of AFDC indicating the changes effective October 1, 1984. This letter defined the AFDC family filing unit in Georgia as follows:

> Beginning October 1, 1984, the needs and income of the parent(s) and all minor siblings or half-siblings living with a dependent child who applies for or receives AFDC must be included for eligibility determination and benefit calculation. SSI recipients, step-brothers, and step-sisters are excluded from this requirement. In other words, an A/R will not longer have the option to voluntarily exclude the needs or income of herself or a child from a grant. Similarly, there is no longer any restricted income.
>
> As stated, the A/R does not have the option to exclude any family member. Therefore, if the A/R refuses to include the income and needs of a child or herself or we are unable to verify the income of a previously excluded child, total ineligibility of the entire group results as we are unable to determine eligibility.

Eligibility Services County Letter No. 84-44, August 23, 1984 (Appendix D, Plaintiffs' Motion for Preliminary Injunction).

Ms. Baldwin was told in September of 1984 by the Muscogee County Department of Family and Children services that the foregoing alterations in AFDC eligibility and benefit determinations required that she include Wilnetta and Lapheitta in the AFDC family filing unit previously comprised of only herself and Schlonda Baldwin. Aff., ¶ 6. Rather than risk losing AFDC benefits because of ineligibility, Ms. Baldwin allowed the inclusion of Wilnetta and Lapheitta in the AFDC family filing unit. *Id.* As a condition of eligibility, Ms. Baldwin was required to assign to the state Wilnetta and Lapheitta's rights of support from their father. 42 USC § 602(a)(26)(A). Georgia undertook the collection of child support payments from Mr. King pursuant to the child support enforcement program set up by the state as a condition of federal funding. *See* 42 USC §§ 602(a)(27), 651 *et seq.*

Although the payment standard for a family of four is $264 per month, Ms. Baldwin and her family do not qualify for an absolute grant of $264. Because the child support income is deemed available to the entire family, 42 USC § 602(a)(38)(B), the family is assumed to have an income of $150 per month, or $200 less the disregard of the first $50 in child support income. 42 USC § 602(a)(8)(A)(vi). Consequently, Ms. Baldwin's family receives a grant of $114 per month. When this grant is coupled with the $150 in child support collected by the state and the $50 disregarded, Ms. Baldwin has a monthly income of $314, or $60 less than before the amendment of the AFDC family filing unit. Baldwin Aff., ¶¶6-7. In short, the family

receives funds from the state amounting to the payment standard of $264 which represents a $114 grant and $150 in collected child support monies. The family also receives the $50 disregarded with no strings attached.

The Baldwins are joined in their complaint by plaintiff-intervenors Brenda Maffett and her children, of Atlanta, Georgia. Ms. Maffett has five children, including Melissa Maffett whose father is Tyrone Davis. Maffett Aff., ¶3. Prior to 1984, Ms. Maffett's family received AFDC benefits which were calculated according to the needs and income of all of Ms. Maffett's children except for Melissa who received child support from Mr. Davis. *Id.*, ¶5. Mr. Davis has voluntarily paid $10 per week in child support for Melissa and has promised to raise the amount of support to $25 per week. *Id.*, ¶¶11 & 24. Ms. Maffett has insured that the $10 per week for Melissa is used for Melissa's benefit. *See id.*, ¶29.

After the implementation of the new family filing unit rule, plaintiff Maffett was forced to include Melissa in her AFDC family filing unit. *Id.*, ¶6. This move evidently did not result in an immediate loss of income because the total monthly child support received by Melissa did not exceed the $50 disregard. 42 USC § 602(a)(8)(A)(vi). Nevertheless, Ms. Maffett insists that the family filing unit amendment has had repercussions in her household. In particular, Ms. Maffett complains that the new rule has resulted in the harassment of Mr. Davis by child support enforcement officials. This harassment, as well as Mr. Davis' general dissatisfaction in having his child placed upon the welfare roles, may result in the cessation of Mr. Davis' otherwise regular visits with Melissa. *Id.*, ¶¶13-20.

II. MOTIONS FOR SUMMARY JUDGMENT

A. *Count One.*

Count one of plaintiff's complaint alleges that defendants' regulations are not authorized by 42 USC § 602(a)(38). Insofar as this allegation asserts the invalidity of the Secretary's regulation, this court finds that the challenged regulation effectuates the statutory mandate directing inclusion of any co-resident sibling of an AFDC recipient child in the AFDC family filing unit if that sibling lives in the same household and is otherwise eligble for assistance. *Oliver vs. Ledbetter,* 624 F. Supp. 325, 330-31 (N.D.Ga. 1985).

The specific application of the statutory amendment to child support recipients, as represented by defendant Ledbetter's aforementioned letter, also appears to the court to be a straightforward interpretation of statutory language. In determining whether Congress intended to deem child support income available so that an AFDC family has the choice either of losing eligibility or including that child in the family filing unit, this court looks first to the plain language of the statute and to legislative history if such language is unclear. *Blum vs. Stenson,* — U.S. —, 104 S.Ct. 1541, 1548 (1984).

The statute on its face reveals Congress' intent to require the inclusion of "any brother or sister of such child" if such brother or sister is living in the same household and otherwise eligible for assistance. 42 USC § 602(a)(38)(B). The plain language also indicates an intention to deem "any income of or available for such . . . brother, or sister" available to the AFDC family filing unit. *Id.*

Nothing in the language of the statute itself calls the court's attention to any intention to exclude a child support recipient or her monthly income merely because her income is for her support alone and is thus legally restricted.

Even if the court were to conclude that the statute on its face is unclear, legislative history indicates that Congress clearly intended to end the practice whereby an AFDC family could exclude a child support recipient from the family filing unit in order to prevent the inclusion of child support income in the family unit's income. The statutory amendment was the result of over two years of study by both Congress and the Secretary of Health and Human Services.[2] The resulting statutory amendment was explained by the Senate Finance Committee as specifically ending the practice of excluding a child receiving child support from the AFDC family filing unit. *See* DRA, S. Rep. No. 98-169, 98th Cong., 2d Sess. 980 (Comm. print 1984).[3] The Conference Committee approved the Senate proposal in almost identical form with the only modification being the addition of the provision disregarding the first $50 of child support income when calculating a family's eligibility and benefits. DRA, H. Conf. Rep. No. 98-861, 98th Cong., 2d Sess. 1407, 1984 U.S. Code Cong. & Ad. News 2095 ("requir[ing] states to include in the filing unit the parents and all minor siblings with a dependent child who applies for or receives AFDC"). Consideration of the legislative history leads inexorably to the conclusion that Congress intended that children receiving child support who are co-resident siblings of AFDC recipient children be included in the AFDC family filing unit and that the child support income be included in the de-

termination of the AFDC family unit's eligibility. *Accord Gilliard vs. Kirk,* 633 F. Supp. 1529, 1548-51 (W.D.N.C. 1986); *Sherrod vs. Hegstrom,* 629 F. Supp. 150, 152 (D. Ore. 1985); *Maryland Department of Human Resources vs. United States Department of Health and Human Services,* Civil Action No. M-86-605, Slip Op. at 15 (D.Md. April 22, 1986); *Childress vs. Heckler,* Civil Action No. 85-2-1459, Transcript of Bench Ruling at 3-4 (D.Col., January 23, 1986); *Johnson vs. Cohen,* Civil Action No. 84-6277, Slip Op. at 36-37 (E.D.Penn., October 2, 1985); *Shonkwiler vs. Heckler,* Civil Action No. 84-1612-C, Slip Op. at 14 (S.D.Ind., January 31, 1985).

This court is not dissuaded from the foregoing conclusions by plaintiffs' argument that child support recipients are not otherwise eligible for assistance as required by section 602(a)(38). Paragraph 38 requires co-resident siblings to meet "the conditions described in clauses (1) and (2) of section 606(a) . . . ." This referenced section defines a "dependent child" as,

> . . . a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home (other than absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States), or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, step-father, step-mother, step-brother, step-sister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or in the equivalent level of vocational or technical training), if, be-

> fore he attains age nineteen, he may reasonably be expected to complete the program of such secondary school (or such training) . . . .

42 USC § 606(a).

Child support recipients are minors and are by definition deprived of parental support by virtue of the absence of one parent from the home. *Oliver,* 624 F. Supp. at 331. The plaintiffs' argument that an individual determination of need for a child support recipient is required has already been thoroughly examined and rejected by this court. *Id.*

> The determination of need is made under 42 USC § 602(a)(7). Paragraph [38], the new family filing unit provision, explicitly states that "in making the determination of paragraph (7)—i.e., the need determination—the state shall include the income of brothers and sisters living with the AFDC child . . . ." [T]he court firmly believes that Congress intended by this language to focus the determination of need not on individual family members, but rather on the neediness of the family unit as a whole.

Id. Accord Gilliard, 633 F. Supp. at 1546. *But see Gorrie vs. Heckler,* 606 F. Supp. 368, 371-72 (D.Minn. 1985); *Gibson vs. Salle,* Civil Action No. 38-85-1283, Slip Op. at 5-7 (N.D.Tenn., February 28, 1986).[4]

This court is also not persuaded by plaintiffs' argument that the principle of "actual availability" prohibits deeming legally restricted child support income as available to the AFDC family filing unit. This principle has its origins in congressional consideration of the 1939 amendments to the Social Security Act. Members of Congress were apparently concerned that the states might

deem income available to the AFDC family which was not actually contributed to the family. *Heckler,* 105 S.Ct. at 1147-48. The Supreme Court has read the legislative history behind the 1939 amendments to prohibit states from "relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need." *Id.* at 1148. Thus, in *King vs. Smith,* 329 U.S. 309, 319-20 (1968), the Court invalidated an Alabama regulation denying assistance to otherwise eligible children because their mother lived with a man not their father. This principle was also employed in the invalidation of a North Carolina regulation deeming as available to the entire family child support monies received by a sibling of an AFDC recipient. *Gilliard vs. Craig,* 331 F. Supp. 587, 593 (W.D.N.C. 1971), *aff'd without opinion,* 409 U.S. 807 (1972).

While the challenged regulations at issue might be subject to a similar attack as made in the *Gilliard vs. Craig* case absent congressional authorization, such authorization is clearly present in the form of the family filing unit amendment. The amendment makes specific reference to section 602(a)(7), the need determination paragraph which has been identified as the source of the "availability" principle. It is said that this amendment reflects a presumption that a mother and her children share the expenses of the household such as food and shelter. *Shonkwiler,* Slip Op. at 14. While the court might quarrel with this presumption in view of the use restrictions on child support payments, it is a presumption which the legislative branch has employed and which this court concludes underlies the congressional authorization of deeming child support income as available to the family

unit. For the foregoing reasons, the court concludes that Congress authorized deeming the child suport income of co-resident siblings of AFDC recipients as available to the family. This new approach to the availability of such income reflects Congress' intention to assess family need and income on an aggregate basis. *Accord Gilliard vs. Kirk*, 633 F. Supp. at 1546-47. *But see Gorrie*, 606 F. Supp. at 371-72; *Gibson*, Slip Op. at 5-7.[5] It is not for this court to substitute its judgment for the Congress' on the way families allocate funds.

B. *Count Two.*

Count two of plaintiffs' complaint alleges that the defendants' interpretation of the family filing unit amendment results in deprivation of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In particular, plaintiffs allege that child support recipients are deprived of their child support without just compensation when they are forced to include their child support income as income available to the AFDC family unit. *See Gilliard vs. Kirk*, 633 F. Supp. at 1551-55; *Johnson*, Slip Op. at 38.[6]

As a preliminary matter, the court must determine whether there are property interests at stake which are protected by the fifth and fourteenth amendments. The parties do not dispute the fact that child support recipients have a property interest in child support payments. A review of Georgia state law confirms the parties' understanding that child support recipients have more than the mere unilateral expectation in child support monies; they

have a property interest defined by state law. *Webb's Fabulous Pharmacies, Inc. vs. Beckwith,* 449 U.S. 155, 161 (1980) (citations omitted). Georgia's statutes impose an obligation upon biological parents to support their children during minority. O.C.G.A. §§ 19-17-2 & -24. This statutory obligation does not cease upon divorce and cannot be waived either by agreement of parents or by order of a court. *Collins vs. Collins,* 172 Ga.App. 748, 749 (1984). Consequently, a court-ordered award of child support, such as that accomplished by court approval of the separation agreement between Ms. Baldwin and Mr. King, is merely an obligation imposed upon a biological parent in lieu of the statutory obligation. *Thomas vs. Holt,* 209 Ga. 133 (1952). In addition to mandating an enforceable right to child support on behalf of minor children, Georgia law requires that the custodial parent spend child support monies for the benefit of the child. *Id.; see also Stewart vs. Stewart,* 217 Ga. 509 (1962). That is, the custodial parent acts as trustee of the child support monies for the child as beneficiary. *Id.*

Having determined that child support recipients have a protected property interest, it is necessary to analyze the extent to which they suffer a diminution in the value of this property interest. Defendants argue that the amendment leaves child support recipients with essentially the same benefit because they receive not only the first $50 in child support payments which is disregarded, but also the remaining child support payments collected by the state and paid to the AFDC family unit. In other words, it is theoretically possible for the custodial parent to sequester money for the benefit of child support recipients alone so that they enjoy the same benefits which they pre-

viously enjoyed as the result of the child support payments. This argument ignores the fact that the custodial parent cannot sequester money for the exclusive benefit of the child support recipients other than the first $50 disregarded. Sequestering portions of the remaining child support payments which are collected by the state and paid to the AFDC family unit would subject the custodial parent to possible civil and criminal sanctions for violating a statute requiring that AFDC funds be spent in the best interest of all children in the family unit. *Gilliard vs. Kirk*, 633 F. Supp. at 1552 (citing 42 USC § 605).

Because child support payments over and above the $50 disregarded are paid to the AFDC family unit in satisfaction of a portion of the payment standard for the family, there is undeniably a diminution in the value of the child support recipient's property interest. This is made clear by reference to the circumstances of the Baldwin family. Prior to the implementation of the amendment, Wilnetta and Lapheitta Baldwin each had a right to enjoy the benefit of $100 of the total $200 per month paid by their father in child support payments. Because the first $50 paid in child support is disregarded, these children retain a right to $25 each per month in child support payments. However, because the remaining $150 is now paid to the Baldwin family in satisfaction of the $264 payment standard for a family of four, Wilnetta and Lapheitta Baldwin can no longer demand their share of this money. Although they previously had a right to $75 apiece, they now have a right only to a pro rata share of the $264 AFDC family budget for a family of four, or a right to $66 apiece. Consequently, under the operation of the amendment, Wilnetta and Lapheitta Baldwin each

contribute $75 apiece to the family unit, but receive only $66 apiece from the family unit. Despite the absence of any obligation to support their co-resident siblings or their custodial parent, they are forced to part forever with $9 apiece per month, which is used to pay for the maintenance of the rest of the family unit. In short, child support recipients in the position of Wilnetta and Lapheitta Baldwin are coerced by the amendment into supporting those they have no obligation to support, and this will always be the case where the amount of income deemed is greater than the amount of government assistance paid.[7]

While child support recipients in the position of plaintiffs Wilnetta and Lapheitta Baldwin clearly suffer a dimunition in the value of their property interest, this diminution does not automatically result in a taking without just compensation. The Supreme Court has not developed any particular formula for determining when "justice and fairness" require compensation as a result of public action diminishing the value of private property. *Penn Central Transportation Company vs. New York City,* 438 U.S. 104, 124 (1978). This determination usually depends upon the facts and circumstances of a particular case. *Id.* Indeed, it has been said that this determination is as much an exercise of the judgment of the court as it is a product of the application of logic. *Andrus vs. Allard,* 444 U.S. 51, 65 (1979).

Despite the absence of any set formulas, the "Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full ex-

ploitation of the property, if such public action is justified as promoting the general welfare." *Webb's Fabulous Pharmacies, Inc. vs. Beckwith*, 449 U.S. 155, 163 (1980) (citations omitted). Consequently, the Court has upheld bans upon the marketing of certain products where such bans substantially serve the public interest. *E.g., Andrus*, 444 U.S. at 64-68 (banning the sale of bald and golden eagles). The Court has also upheld significant limitations upon improvement of private property where the limitations are in the interest of the general public. *E.g., Penn Central*, 438 U.S. at 125-29 (limitation on development of historic landmarks such as Grand Central Terminal). Such limitations have denied the property owner free choice in the use of his property. Nevertheless, as the Court noted in the *Andrus* case,

> [T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety. . . . In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the [property].

Andrus, 444 U.S. at 65-66. While the limitations on the use of the property are often so severe as to make any profitable use impossible, the Court has concluded that this is a risk of doing business in a civilized community. *Id.* at 67.

The foregoing permissive approach to governmental regulations of the use of private property may be contrasted with those cases in which there has been an actual physical invasion of private property or complete destruc-

tion of such property. This contrast is evidenced in the case of *Loretto vs. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court in that case was faced with a statute which required that a landlord permit a cable television company to install facilities on a landlord's property and prohibited a demand of payment from the company in excess of a fee determined to be reasonable by a state agency. The state agency ruled that a one-time one dollar payment was a reasonable fee. Noting that the installation of cable television facilities on the landlord's property amounted to a permanent, physical occupation of the property, the Court concluded that the landlord's right to possess, use and dispose of the property had been destroyed. *Id.* at 435. The right to possess the occupied space and to exclude others from that space was clearly vitiated by the statute. *Id.* Moreover, he could not control the use of the property; that is, he not only was prevented from excluding others, but also from making any non-possessory use of the property. *Id.* at 436. Finally, any legal right to dispose of the occupied space was emptied of any value, since a purchaser would also be unable to make any use of the property. *Id.* Under such circumstances, the Court concluded that the landlord's property had been taken without just compensation. *Id.* at 441.

Defendants would have this court draw an analogy between the family filing unit amendment and those cases in which the Court has been permissive in upholding regulation of the use of private property. However, unlike the economic actors in those cases, child support recipients have not subjected themselves to the risk of regulation of the use of their child support payments. The coercive na-

ture of the amendment makes clear that child support recipients do not voluntarily subject themselves to AFDC regulations. *Compare Gilliard vs. Kirk,* 633 F. Supp. at 1551-52 *with Whitney vs. Heckler,* 780 F.2d 963, 972 (11th Cir. 1986) (participation by doctors in the Medicare program held voluntary).

A more significant distinction between child support recipients and voluntary economic actors who suffer some limitation on the beneficial use of private property is the actual limitation placed upon child support payments as a result of the amendment. Those child support recipients in the position of plaintiffs Wilnetta and Lapheitta Baldwin suffer more than a mere limitation on the use of child support payments. They actually suffer the dispossession of a portion of their child support which is taken from them and used to support the AFDC family unit. In the case of plaintiffs Wilnetta and Lapheitta Baldwin, there is a complete deprivation of at least $18 per month which is collected by the state and given to co-resident siblings. Because the state has collected this money for the AFDC family unit, these plaintiffs no longer have the right to possess the money themselves and the consequential power to exclude the state and its AFDC dependents from possession and use of the money. *Gilliard vs. Kirk,* 633 F. Supp. at 1554. Indeed, they are forced to use their property for the benefit of others. If the takings clause means anything, it means that the government cannot force child support recipients "to bear public burdens which in all fairness should be borne by the public as a whole." *Id.* (quoting *Armstrong vs. United States,* 364 U.S. 40, 49 (1960)).

Defendants argue that even if the amendment works a taking, there is just compensation in the form of a guaran-

tee that the child support monies will be collected. *See Seagraves vs. Harris,* 629 F.2d 385, 392 (5th Cir. 1980). Defendants also point to other benefits, such as eligibility for the Medicaid program, which accompany membership in the AFDC family unit. *See* 42 USC § 1396(a)(10). Recognizing that child support recipients do receive these benefits, the court cannot conclude that these benefits amount to just compensation. Just compensation means the fair market value of the property on the date it was appropriated. *Kirby Forrest Industries, Inc. vs. United States,* 467 U.S. 1, 10 (1984). "Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking." *Id.* (citations omitted). The court cannot conclude that the rather intangible guarantees which defendants postulate amount to just compensation would be equivalent to a cash payment of the amount of child support payments which child support recipients are now forced to spend upon the AFDC family unit. For example, the court cannot assume that Wilnetta and Lapheitta Baldwin would accept the status of a ward of the state in return for anything less than the payment in cash of the money which they are forced to spend on the other members of their family.

For the foregoing reasons, the court concludes that the AFDC family filing unit amendment works a taking without just compensation when applied to child support recipients in the position of plaintiffs Wilnetta and Lapheitta Baldwin. Defendants may not enforce the amendment without compensating such child support recipients in cash.

C. Count Three.

Count three of plaintiffs' complaint alleges that defendants' interpretation of the family filing unit amend-

ment violates the Tenth Amendment to the United States Constitution. In particular, plaintiffs contend that the amendment forces custodial parents to violate their duty under state law to use the child support payments for the support and maintenance of the designated recipients. By forcing custodial parents to breach a state-imposed duty, plaintiffs contend that the amendment violates the tenth amendment by intruding impermissibly into state family law, an area traditionally governed by state law.

The tenth amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Pointing out that this amendment may serve at most to protect the sovereign State of Georgia in its control over family law, defendants argue that plaintiffs lack standing to assert the rights of the state. Defendants do not deny that plaintiffs have met the article III requirements of standing in that they have suffered distinct injury traceable to the challenged conduct of defendants. *See Duke Power Company vs. Carolina Environmental Study Group,* 438 U.S. 59, 72 (1978). Rather, defendants suggest that none of the plaintiffs is a proper party to assert a tenth amendment challenge.

Although plaintiffs have alleged injuries sufficient to meet the "case or controversy" requirement, the court agrees with defendants that a plaintiff "generally must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interests of third parties." *Worth vs. Seldon,* 422 U.S. 490, 499 (1975). This prudential limitation on standing is meant to avoid the adjudication of rights which the third party may not want to assert and to insure the most effective advocacy of the

rights at issue. *Duke Power Company*, 438 U.S. at 80. These prudential considerations "serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provisions on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Worth*, 422 U.S. at 500. Of course, there are circumstances where the underlying justifications for this prudential limitation are absent. For example, where the relationship of the plaintiff to the third person is such that the enjoyment of a third party's right is inextricably connected with the activity the party wishes to pursue, courts can rest assured that adjudication of a third party's rights is appropriate and not an exercise in abstract analysis. *Singleton vs. Wulff*, 428 U.S. 106, 114-15 (1976). This is particularly true where physicians are advocating the rights of their patients. *See id.*

The prudential limitations upon this court's jurisdiction argue against recognizing plaintiffs as the proper parties to assert Georgia's tenth amendment rights. It is evident that the third party not before this court, the State of Georgia, may not wish to assert its tenth amendment rights in the context of its participation in the AFDC program. Furthermore, there is an absence of the kind of special relationship identified in cases such as *Singleton vs. Wulff* between the plaintiff and the third party. Indeed, the interest of plaintiffs and that of the State of Georgia may be antagonistic to the extent that Georgia, through its agent, defendant Ledbetter, has cooperated in the implementation of the challenged regulations. This is a classic case for invoking the prudential limitation against the assertion of third-party rights.

In sum, the court concludes that the plaintiffs are not proper parties to raise a tenth amendment claim.

D. *Count Four.*

Count four of plaintiffs' complaint alleges that "[i]n order to accord full faith and credit, as required by 28 USC § 1738, to the state court judgments which legally restrict child support to the use of the child on whose behalf it is paid, [the amendment] must be construed as excluding" such payments from income available to the AFDC family unit. The full faith and credit provision cited in plaintiffs' complaint does not provide a barrier to congressional action, but rather requires a recognition of a state court's judgments by every other court within the United States. The statute by its very terms is inapplicable to the enforcement of a congressional mandate by administrative agencies.

> The records and judicial proceedings of any court of any State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such . . . records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 USC § 1738.

In any event, full faith and credit need not be strictly accorded where Congress has indicated a policy contrary

to a particular state judgment. *See American Mannex Corp. vs. Rozands,* 462 F.2d 688, 690 (5th Cir.), *cert. denied,* 409 U.S. 1040 (1972) (cases cited therein). In short, there is nothing inherent in the full faith and credit statute which limits congressional action taken in amending the AFDC family filing unit.

E. *Counts Five and Six.*

Counts five and six of plaintiffs' complaint allege deprivations of equal protection and due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs' briefs have fleshed out the specific ways in which the amendment violates plaintiffs' equal protection, substantive due process and procedural due process rights. The alleged violations of these various rights will be considered *seriatim.*

1. *Equal Protection.*

Plaintiffs allege a violation of their right to equal protection because the family filing unit amendment impermissibly distinguishes between child support recipients who live with siblings receiving AFDC benefits and those who do not live with siblings receiving AFDC benefits. Additionally, plaintiffs contend that the amendment results in disparate treatment between plaintiffs who receive child support and those child support recipients who are not forced to apply for AFDC benefits because of certain exclusions in the law. Plaintiffs point to the treatment of children of absent military personnel and the children of aliens who are not affected by the family filing unit amendment.

The first step in determining whether equal protection under the laws has been denied a person is a determination of whether persons who are similarly situated have been subjected to disparate treatment. *Johnson vs. Smith,* 696 F.2d 1334, 1336 (11th Cir. 1983). "Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle [equal protection of the laws] is violated arise." *Id.* (quoting *New York City Transit Authority vs. Beazer,* 440 U.S. 568, 587-88 (1979)). In determining whether a group of persons is similarly situated with another group, this court is enjoined to look first at the purpose of the law giving rise to the alleged classifications. *Johnson,* 696 F.2d at 1336-37 (citations omitted).

With this standard in mind, it is evident that plaintiffs' equal protection claim does not even allege disparate treatment of similarly situated persons. The amendment was intended to include all co-resident siblings of AFDC recipient children who are otherwise eligible for AFDC assistance so that the AFDC family filing unit accurately reflects the income and needs of the entire economic unit. Therefore, child support recipients are similarly situated for the purposes of the amendment if they are otherwise eligible for AFDC benefits and live with siblings receiving such benefits. Child support recipients who do not live with siblings receiving AFDC benefits are not in the same situation as the class of plaintiffs receiving child support. They are not required to apply for AFDC benefits because they do not live in a household with current AFDC recipients. In short, they are not even subject to the jurisdiction of defendants.

The alleged differentiation between plaintiffs and the children of military personnel and aliens also fails to identify a similarly situated group. Children of military personnel who are absent from the home because of military duty are by definition not children deprived of parental support and thus otherwise eligible within the meaning of the challenged regulations. *See* 42 USC § 606(a)(1). Children of aliens not permanently residing in the United States are also by definition not children otherwise eligible for financial assistance. *See* 42 USC § 602(33). Such children are not considered dependent children. *Id.*[8]

2. *Procedural Due Process.*

Plaintiffs also invoke the protection of procedural due process. They contend that the absence of any individualized determination that child support monies are actually available to co-resident siblings receiving AFDC benefits deprives plaintiff child support recipients of their right to a pre-deprivation hearing. *See Gorrie,* 606 F. Supp. at 373. Even if this argument had merit standing alone, it is rendered moot by this court's earlier conclusion that child support recipients in the position of plaintiffs Wilnetta and Lapheitta Baldwin suffer a taking without just compensation. Because defendants may not now take child support payments without just compensation, no deprivation will occur for which a pre-deprivation hearing is necessary. That is, those plaintiffs such as Wilnetta and Lapheitta Baldwin who may be said to have suffered a deprivation of a property interest will not suffer any deprivation under this court's ruling necessitating the provision of procedural protections.[9]

3. *Substantive Due Process.*

Plaintiffs finally argue that the family filing unit amendment abridges their liberty interests as guaranteed by the substantive due process clauses of the fifth and fourteenth amendments. To the extent that plaintiffs rely upon the effect upon the liberty interest of child support recipients, this court agrees for the following reasons.

The Supreme Court "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause . . . ." *Cleveland Board of Education vs. LaFleur,* 414 U.S. 632, 639 (1974). Even though there is no explicit protection for such matters in the Constitution, the Court has consistently recognized that a so-called "right of privacy" is implicit in the notion of liberty. *Carey vs. Population Services International,* 431 U.S. 678, 684-85 (1977). This right of privacy establishes "a private realm of family life which the state cannot enter." *Prince vs. Massachusetts,* 321 U.S. 158, 166 (1944).

That the Court has been willing to find protection for the institutions of marriage and family should come as no great surprise to students of our Constitution. The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The language and the history of this amendment provide ample support for the proposition that the liberty protected by the substantive due process clause is not restricted to those rights specifically mentioned in the Bill of Rights. *Griswold vs. Connecticut,* 381 U.S. 479, 493 (1965) (Goldberg, J., concurring); *see id.* at 484.

While substantive due process analysis presents the spectre of jurisprudence which depends upon the personal philosophy of a particular judge, *see Moore vs. City of East Cleveland,* 431 U.S. 494, 502 & n. 8 (1977) (plurality opinion), this danger has been minimized by commitment to the traditions and collective conscience of the American people. *Griswold,* 381 U.S. at 493 (Goldberg, J., concurring). Thus, the Court has asked whether the right implicated "is of such a character that cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ." *Id.* (quoting *Powell vs. Alabama,* 287 U.S. 45, 67 (1932)).

This recourse to the traditions and conscience of the country has been responsible for the Court's willingness to recognize the aforementioned right of privacy surrounding family life. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore,* 431 U.S. at 503-04 (footnotes omitted). In particular, the Court has recognized the traditional role of parents in raising their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince,* 321 U.S. at 166 (citation omitted); *see also Wisconsin vs. Yoder,* 406 U.S. 205, 232 (1972). A special solicitude for the parental role has led the Court to protect the family against various unjustified intrusions.

See, e.g., Moore, 431 U.S. at 500-01 (right of grandparents to raise grandchildren); *Pierce vs. Society of Sisters,* 268 U.S. 510, 534-35 (1925); *Meyer vs. Nebraska,* 262 U.S. 390, 399-401 (1923) (both cases upholding the right of directing the upbringing and education of children).

If the role of the parent is so fundamental as to deserve special protection, then certainly the child has the right to enjoy the nurturing and guidance afforded by a parent willing to discharge his or her obligations. When a child's upbringing is directed by a parent, that child is necessarily the recipient of the parental values. The fact of parental support is perhaps as important as any value which a parent can pass along to a child. The child learns by example that offspring must be cared for and not left to the mercy of other relatives or of the state. The absence of support may well result in wholly different expectations; deprived of a role model, a child might conclude that the obligations of parenthood cease at the moment of procreation.

The interest which a child has in choosing at least whether he or she either will be a ward of the state or a valued member of a family is made painfully clear in the case of the child support recipient plaintiffs. Although these children do not experience the traditional two-parent family, they do enjoy their status as children whose parents live up to their obligations. They enjoy the distinction of a non-custodial parent who offers not only financial support, but also moral and emotional support. Living in an otherwise economically disadvantaged household, these child support recipients gain self-esteem and dignity from being cared for by their own; they are reassured

that despite their disadvantages, they are no different from the more well-heeled members of our society.

To be sure, the interest of the child in the support and nurture of his or her parent is not a liberty interest which has been explicitly recognized as protected by the due process clause. "But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the . . . Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Moore*, 431 U.S. at 501.

Just because the right at stake in this action is fundamental does not mean that the challenged amendment is automatically subjected to rigorous scrutiny. *Zablocki vs. Redhail*, 434 U.S. 374, 386-87 (1978). It must appear that the governmental regulation "directly and substantially" interferes with the rights at stake before heightened scrutiny is applied. *Lyng vs. Castillo*, — U.S. —, 106 S.Ct 2727, 2729 (1986) (citations omitted). Only when there is such an interference does the court ask whether the purpose of the governmental regulation is important or compelling and whether the government has chosen sufficiently tailored means for achieving its purpose. *Zablocki*, 434 U.S. at 388; *Moore*, 431 U.S. at 499.

A review of the potential effects of the family filing unit amendment convinces this court that there is a direct and substantial interference with the fundamental rights at stake. Unlike the circumstances in the case of *Lyng vs. Castillo*, the child support plaintiffs in this action were not voluntary participants in a governmental welfare program prior to the implementation of the challenged regu-

lation. Moreover, unlike the circumstances in the *Lyng vs. Castillo* case, the child recipient plaintiffs have not merely been forced to rearrange an incident of family life. 106 S.Ct. at 2730 (conditioning continued participation by unrelated food stamp recipients on the preparation of meals together). Instead, these child support recipients have been coerced into being wards of the state with all the consequences that has for their relations with their non-custodial parents.

In particular, these children stand to lose the two essential attributes of parenthood which this court has identified as at stake. First, these children face the prospect of less nurturing and guidance from their non-custodial parent as a result of fewer contacts with that parent. The non-custodial parent is apt to be discouraged from continuing to play a supportive role when his or her money is being collected by the state and paid to other children. Such resentment is evidenced by the record. Maffett Aff., ¶¶ 13-20. The mere interposition of the government as paying agent may itself mean less contacts with the child.

In addition to the direct effect upon the relationship between the child and the non-custodial parent, the child support recipient stands to lose that self-esteem and dignity which accompanies being supported by one's own family. While the very youngest children may not recognize their status, children of sufficient age to appreciate the source of clothing and other personal items will know that they are not self-sufficient. They will undoubtedly lose sight of the valuable lessons which accompany the support of one's parents. Their new-found circumstances may even generate a "feeling of inferiority as to their status in the community that may affect their hearts and minds in a way

unlikely ever to be undone." *Brown vs. Board of Education*, 347 U.S. 483, 494 (1954).

Although the justification for intruding into the personal choice of a child to be supported either by the state or by a parent may well be important in light of the current deficit crisis, it is clear that the AFDC family filing unit amendment was not narrowly tailored to accomplish the deficit reduction goals. Congress can still deem an incremental share of child support payments of co-resident siblings available to the AFDC family unit for the purpose of insuring that the AFDC family unit does not receive more government funds than are actually necessary for its support. The documented experience of AFDC families will provide the yardstick by which to measure that portion of child support payments received by co-resident siblings which inure to the benefit of other family members. Such a statute might deem a percentage of Wilnetta and Lapheitta Baldwin's child support income as being available to the whole family to the extent that their pro rata contribution to family expenses lessens the expenditures otherwise required to provide for the basic needs of the other family members. Under a more narrowly-drawn statute Wilnetta Lapheitta Baldwin would retain the right to choose whether they want to be members of the AFDC family unit and whether they wish to elect voluntarily to assign their support payments in return for guarantees and other government assurances.

For the foregoing reasons, this court concludes that the AFDC family filing unit amendment abridges the substantive due process rights of the child support recipient plaintiffs. *Accord, Gilliard vs. Kirk*, 633 F. Supp. at 1563.[10]

F. *Count Seven.*

Plaintiffs allege finally that the amendment results in the impairment of obligation of contract in violation of Article I, Section 10, Clause 1 of the United States Constitution. Because custodial parents are obligated to spend child support monies for the benefit of the recipient children, plaintiffs claim that the challenged amendment forces the custodial parents to breach their contractual obligations. It is clear that plaintiffs represented by Ms. Baldwin have contractual obligations with regard to child support monies paid pursuant to an agreement. However, the only obligation in the case of child support payments made voluntarily is the general obligation imposed by Georgia law upon custodial parents. Consequently, the court reads count seven as applying only to those custodial parents who receive child support payments on behalf of children pursuant to agreements, court-approved or otherwise.

Having defined the contractual obligation at issue, it is evident that the amendment is not even subject to attack for the alleged infringement. The contract clause proscribes only state legislation "impairing the obligation of contracts . . . ." U.S. Const. art. I, § 10, cl. 1. By its very definition, this clause does not operate to limit federal enactments. *Pension Benefit Guaranty Corporation vs. R. A. Gray and Company,* — U.S. —, 104 S.Ct. 2709, 2719 n. 9 (1984). Because this clause operates only to restrict state legislative enactments, it is difficult to conceive how it could operate to limit the family filing unit rule. Naturally, neither the statutory amendment nor the federal regulation fall within the prohibition of the contract clause.

Defendant Ledbetter's letter was not itself a separate legislative enactment. Rather, his letter directed to county

directors of AFDC merely evidenced the implementation of federal law. In view of the fact that his letter was issued pursuant to federal authority requiring implementation of the family filing unit amendment as a condition of federal funding, the court concludes that the letter is part and parcel of a federal enactment which is immune from contract clause attack. For the foregoing reasons, the court concludes that the contract clause does not operate as a limitation upon the family filing unit amendment.

In sum, defendants' motions for summary judgment are GRANTED IN PART and DENIED IN PART. Plaintiffs' cross motion for summary judgment is GRANTED IN PART and DENIED IN PART.

III. MOTION FOR PRELIMINARY INJUNCTION.

Although the disposition of the cross motions for summary judgment entitles plaintiffs to injunctive relief, such relief is appropriately characterized as permanent rather than preliminary relief. Plaintiff's motion for preliminary injunction is accordingly DENIED as moot.

IV. CONCLUSION.

Defendants' motions for summary judgment are GRANTED IN PART and DENIED IN PART. Plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART. Plaintiffs' motion for preliminary injunction is DENIED as moot.

Because the family filing unit amendment effects a taking without just compensation and abridges plaintiff child support recipients' substantive due process rights, plaintiffs are entitled to permanent injunctive relief.

Defendants are hereby enjoined from forcing child support recipients who are co-resident siblings of AFDC family members to apply for AFDC benefits and to assign their child support to the State of Georgia as a condition of their co-resident siblings' eligibility for AFDC benefits. Defendants are also enjoined from terminating or reducing the AFDC grants of AFDC family units based on child support income received by co-resident siblings who do not choose to be members of the AFDC family filing unit. Defendants are furthermore ORDERED to inform all class members of their rights under this order by way of a notice to be included with AFDC checks delivered during the month of November and by way of notice to any families whose AFDC benefits have been terminated by the State of Georgia as a result of the family filing unit amendment.

SO ORDERED, this 17th day of October, 1986.

/s/ J. Owen Forrester
United States District Judge

FOOTNOTES

[1] Georgia is given the discretion of calculating the amount of AFDC grants based upon a percentage of a statewide standard of need for a family of a given size. *See* 45 C.F.R. § 233.20. Georgia's payment standard is currently set at approximately sixty-one percent of the need standard, though it is subject to change.

[2] The Senate Finance Committee first proposed to reduce federal AFDC expenditures by prohibiting "[t]he present practice whereby families exclude members with income, such as Social Security or child support payments, in order to maximize family benefits . . . ." Tax Equity and Fiscal Responsibility Act of 1981, S. Rep. No. 494, 97th Cong., 2d Sess. 47, 1982 U.S.

Code Cong. & Ad. News 823. This proposal was dropped in a Conference Committee with the House of Representatives. H. Conf. Rep. 97-760, 97th Cong., 2d Sess. 466, 1982 U.S. Code Cong. & Ad. News 1226. The Secretary of Health and Human Services submitted a proposal to the U.S. Senate on May 25, 1983, almost identical to the resulting statutory language at issue in this litigation. This proposal was intended to require that the states include "as a member of the AFDC family (both the needs and the accountable income of) . . . the minor siblings of a dependent child for whom aid is claimed and who are living with a dependent child if the siblings are, themselves, deprived of parental support or care and under the age limit selected by the State." *See* Letter from Secretary Margaret M. Heckler to Vice President George Bush (Exhibit A, Federal Defendant's Brief in Opposition to Preliminary Injunction). The Senate Finance Committee approved a version of this proposal indicating their intention to prohibit the exclusion of child support recipients and their income from the AFDC family filing unit. S. Rep. No. 300, 98th Cong., 2d Sess. 165 (Comm. print 1983). Although this proposal was dropped in a conference with the House of Representatives, it resurfaced the following year in the Deficit Reduction Act.

[3] The pertinent portion of this Committee report reads as follows:

> The provision approved by the Committee would require States to include in the filing unit the parents and all dependent minor siblings (except SSI recipients and any step-brothers and step-sisters) living with a child who applies for or receives AFDC . . . .
>
> This change will end the present practice whereby families exclude members with income in order to maximize family benefits, and will insure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole. A similar provision was approved by the Committee last year, but was dropped in conference with the House.

[4] Section 602(a)(7) provides in pertinent part:

> . . . The state agency—
>
> (a) shall, in determining need, take into consideration any other income and resources of any child or relative claiming Aid to Families with Dependent Children, or of any

other individual (living in the same home as such child and relative) whose needs the state determines should be considered in determining the need of the child or relative claiming such aid . . . .

[5] This court should make clear that the foregoing conclusions are unaided by the expert testimony submitted by plaintiffs in support of their motion for summary judgment. This testimony, given by a social welfare expert, may well reflect the consequences of the family filing unit amendment upon AFDC families and upon parents making child support payments. *See* Declaration of Judith Cassetty, at 10-12. Nevertheless, this expert's testimony in no way influences this court's conclusions regarding congressional intent. It may be inconceivable to plaintiffs' expert that Congress intended implementation of the regulations at issue in this litigation, but such conclusions based upon factual judgments regarding the best welfare policy can have no effect upon this court's dispassionate legal analysis of congressional intent.

[6] Of course, this allegation pertains only to members of the plaintiff class who receives more than $50 per month in child support income. For example, Ms. Maffett, who has in the past received approximately $40 per month in child support income for her daughter Melissa, would not have grounds to challenge the regulations as a taking because the first $50 of child support income is automatically disregarded. 42 USC § 602(a)(8)(A)(vi).

[7] The foregoing analysis establishes a diminution in the value of the child support recipient's property interest without reference to the individual budget of a particular family unit. Anecdotal evidence of the expenditure of child support money exclusively on the need of a child support recipient would obviously establish a taking if the amendment operated to prevent the purchase of that exclusive benefit. *See Johnson,* Slip Op. at 10-12.

[8] Congress was careful to include the caveat "except as otherwise provided in this part" when enacting the family filing unit amendment. 42 USC § 602(a)(38). This caveat must be read as leaving intact those consistent statutory provisions such as the rule regarding the children of aliens.

[9] If this court were to address the necessity of procedural protections under the circumstances of this case, it would be the court's inclination to conclude that no individual has a right to a particularized determination that their family is extraordinary in that child support benefits are not used to meet at least a

portion of common household needs. *See Bi-Metallic Investment Company vs. State Board of Equalization,* 239 U.S. 441, 445 (1915). That is, the presumption that child support monies are used to benefit the AFDC family unit is a determination of a legislative fact rather than an adjudicative fact. *Atkins vs. Parker,* — U.S. —, 105 S.Ct. 2520, 2530 (1985).

10 The foregoing analysis assumes that child support recipients will not avoid the effect of the amendment by moving out of the household they share with siblings on AFDC. Of course, if the amendment has the unintended effect of actually forcing child support recipients to live with other relatives, the court's conclusions regarding the abridgement of their substantive due process rights would remain unchanged. Forcing children to move out of the household with the custodial parent would be an even more egregious interference with the child's liberty interest. *See Gilliard vs. Kirk,* 633 F. Supp. at 1558.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VERNITA BALDWIN, on behalf of herself and her minor children, WILNETTA BALDWIN, LAPHEITTA BALDWIN, and SCHLONDA BALDWIN, and all others similarly situated,

Plaintiff,

vs

CIVIL ACTION
NO. C85-4340A

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources; and OTIS R. BOWEN, M.D., in his official capacity as Secretary of the United States Department of Health and Human Services,

Defendants.

J U D G M E N T

(Filed October 17, 1986)

This action came on for consideration and hearing before the Court, Honorable J. Owen Forrester, United States District Judge, and the issues having been considered and a decision having been rendered,

IT IS ORDERED AND ADJUDGED that the defendants, JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources, and OTIS R. BOWEN, M.D., in his official capacity as Secretary of the United States Department of Health and Human Resources, and those acting in concert

with them are enjoined from forcing child support recipients who are co-resident siblings of AFDC family members to apply for AFDC benefits and to assign their child support to the State of Georgia as a condition of their co-resident siblings' eligibility for AFDC benefits. Defendants are also enjoined from terminating or reducing the AFDC grants of AFDC family units based on child support income received by co-resident siblings who do not choose to be members of the AFDC family filing unit,

FURTHER ORDERED AND ADJUDGED that defendants shall inform all class members of their rights by way of a notice to be included with AFDC checks delivered during the month of November and by way of notice to any families whose AFDC benefits have been terminated by the State of Georgia as a result of the family filing unit amendment.

Dated at Atlanta, Georgia this 17th day of October 1986.

FILED AND ENTERED IN CLERK'S OFFICE

October 17, 1986
Luther D. Thomas, Clerk

/s/ BY: Janice C. Murray
Deputy Clerk

Luther D. Thomas, Clerk of the Court

/s/ By: Janice C. Murray
Deputy Clerk
October 17, 1986

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VERNITA BALDWIN, ON BEHALF OF HERSELF AND HER MINOR CHILDREN, WILNETTA BALDWIN, LAPHEITTA BALDWIN, AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

JAMES G. LEDBETTER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE GEORGIA DEPARTMENT OF HUMAN RESOURCES, AND OTIS R. BOWEN, M.D., IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

CIVIL ACTION
FILE NO.
C85-4340A

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed November 13, 1986)

NOTICE IS HEREBY GIVEN that the Defendant, James G. Ledbetter, Commissioner of the Georgia Department of Human Resources, hereby appeals to the Supreme Court of the United States from the final order

entered in this action on October 17, 1986, the final judgment entered on October 17, 1986 and oral modification announced by the court on October 22, 1986.

This Appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

This 13th day of November, 1986.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
First Assistant Attorney General

/s/ William C. Joy 405500
Senior Assistant Attorney General

/s/ David C. Will 760150
Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

WILLIAM C. JOY
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3306

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF UNITED STATES, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Ms. Lisa J. Krisher
Georgia Legal Services Program
P.O. Box 2185
Augusta, Georgia 30903

Ms. Phyllis J. Holmen
Georgia Legal Services Program
133 Luckie Street, N.W.
8th Floor
Atlanta, Georgia 30303

Ms. Jenny L. Mittelman
Atlanta Legal Aid Society, Inc.
151 Spring Street, N.W.
Atlanta, Georgia 30335

Ms. Jane Swift
Assistant U.S. Attorney
1800 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30335

Solicitor General
Department of Justice
Washington, D.C. 20503

This 13th day of November, 1986.

/s/ David C. Will
Assistant Attorney General

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VERNITA BALDWIN, on behalf of herself and her minor children, WILNETTA BALDWIN and SCHLONDA BALDWIN and all others similarly situated,

PLAINTIFF,

vs.

CIVIL ACTION NO. C85-4340A

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources; and OTIS R. BOWEN, M.D., in his official capacity as Secretary of the United States Department of Health and Human Services,

DEFENDANTS.

ORDER

(Filed November 18, 1986)

This action is before the Court on Defendant JAMES G. LEDBETTER'S oral request to modify the Court's Order entered October 17, 1986. Specifically, Defendant Ledbetter requests that the Court grant Defendant Ledbetter an extension of time to send notice to all class members to inform them of their rights under the Order rather than as ordered through an insert with November 1986 Aid to Families with Dependent Children (AFDC) checks. Plaintiffs requested that a date be specified for notification of the members of the class whose benefits have been terminated.

Counsel for Defendant Ledbetter cited physical problems with notifying recipients and County Department of Family and Children Services eligibility workers. Defendant Ledbetter's counsel also stated Defendant Ledbetter intends to appeal the Court's Order dated October 17, 1986, and file a Motion For Stay Pending Appeal.

Plaintiffs' counsel opposed Defendant Ledbetter's oral requests, arguing that Defendant Ledbetter should have filed a Motion For Stay Pending Appeal to request such relief. Plaintiffs' counsel also raised the irreparable harm to Plaintiffs if they are not notified of the Court's Order and Judgment, thus preventing them collecting AFDC and Child Support in November 1986.

Counsel for Defendant OTIS R. BOWEN participated in the conference but did not present argument.

Upon consideration of the arguments presented, and in recognition of the Court's intention that class members be identified in order that benefits may be paid as quickly as possible if no stay is granted, it is HEREBY ORDERED:

1.

Defendant Ledbetter shall notify the class members who are current recipients of their potential rights under the October 17, 1986 Order by sending the following notice as an insert with the November 1986 AFDC checks:

IMPORTANT NOTICE

Do you have a child or children whose other parent pays child support? If so, you may be able to get more money. A federal court has decided you have the right

to decide to leave off that child or children from your AFDC (Welfare) grant and collect your own child support. As soon as possible contact your caseworker or local Legal Services Program for more information.

2.

By November 3, 1986, Defendant Ledbetter shall notify all County Department of Family and Children Services (DFCS) AFDC workers about the October 17, 1986 Order.

3.

Counsel for the parties shall agree upon a notice to all inquirers to DFCS about the Court's Order. Said notice shall describe class members' potential constitutional rights and ability to make a choice to put a child with child support on AFDC under the Court's Order, in the event it is upheld on appeal. Said notice shall contain an election form which permits the parent to make a knowing and voluntary waiver of the child(ren)'s constitutional rights: 1) to avoid a taking of the child(ren)'s child support by the State; and 2) to prevent a violation of substantive due process rights by interferring with the family relationship by forcing the child(ren) onto AFDC and assigning their rights to their child support to the State of Georgia. Said notice and waiver shall be sent by DFCS office and available for use no later than November 12, 1986. Also effective November 12, 1986, the same notice and waiver shall be used in conjunction with each applicant for AFDC who has child support income.

4.

By November 27, 1986, Defendant Ledbetter shall notify members of the class whose AFDC benefits have been terminated by methods agreed to by the parties. If the parties do not agree, further conference with the Court may be requested.

5.

Defendant Ledbetter shall file his Motion For Stay Pending Appeal by November 3, 1986. Plaintiffs shall have ten days within which to file a response.

This 17th day of November, 1986.

/s/ J. Owen Forrester
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VERNITA BALDWIN, on behalf of herself and her minor children, WILNETTA BALDWIN, LAPHEITTA BALDWIN, and all others similarly situated,

Plaintiff,

v.

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources; and OTIS R. BOWEN, M.D., in his official capacity as Secretary of the United States Department of Health and Human Services,

Defendants.

CIVIL ACTION
NO. C85-4340A

MOTION FOR STAY OF JUDGMENT PENDING APPEAL

(Filed October 31, 1986)

Comes now Defendant James G. Ledbetter, Commissioner of the Georgia Department of Human Resources, and pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, moves this Court for an Order staying enforcement of this Court's Order in the above-styled case pending resolution of this case upon appeal. Defendant respectfully requ sts a stay of this Court's Order issued Oc-

tober 17, 1986 and further Order of this Court issued orally on October 22, 1986. The reasons for Defendant's Motion are set out more fully in the attached Brief.

Defendant Ledbetter will appeal this judgment within the time provided by law. Pursuant to 28 U.S.C. § 1252, Defendant will appeal to the United States Supreme Court.

Because Defendant is a State official sued in his official capacity and because the State and Federal Governments will have adequate resources to pay future increased benefits to Plaintiffs if Defendant's appeal is unsuccessful, Defendant requests that no supersedeas bond be required as a condition to the entry of the stay order.

This 31st day of October, 1986.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
First Assistant Attorney General

WILLIAM C. JOY 405500
Senior Assistant Attorney General

/s/ MARY FOIL RUSSELL 266960
Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VERNITA BALDWIN, on behalf of herself and her minor children, WILNETTA BALDWIN, LAPHEITTA BALDWIN, and all others similarly situated,

Plaintiff,

v.

CIVIL ACTION NO. C85-4340A

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources; and OTIS R. BOWEN, M.D., in his official capacity as Secretary of the United States Department of Health and Human Services,

Defendants.

BRIEF IN SUPPORT OF DEFENDANT LEDBETTER'S MOTION FOR STAY OF JUDGMENT PENDING APPEAL

I. INTRODUCTION

This case involves a challenge by Plaintiffs to regulations promulgated by the Georgia Department of Human Resources in compliance with § 2640(a) of the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 1145 (1984) (codified at 42 U.S.C. § 602(a)(38)) and implementing federal regulations found at 45 C.F.R. § 206.10(a)(1)(vii)(B). In this Court's Order issued October 17, 1986, the Court found that because § 602(a)(38)

affects a taking without just compensation and abridges Plaintiff child support recipients' substantive due process rights, Plaintiffs are entitled to permanent injunctive relief. The Court enjoined Defendant from "forcing child support recipients who are co-resident siblings of AFDC family members to apply for AFDC benefits and to assign their child support to the State of Georgia as a condition of their co-resident siblings' eligibility for AFDC benefits." Order at 38. The Court further enjoined Defendant from terminating or reducing the AFDC grants based upon child support income of children who do not choose to be members of the AFDC grant group. *Id.*

In its October 17th Order, the Court ordered Defendant to inform all class members of their rights under the Order by way of a notice to be included with AFDC checks delivered during the month of November, and by notice to any families whose benefits have been terminated as a result of the standard filing unit statute. In its Order issued October 21, 1986, the Court further ordered the Defendant to publish a policy memorandum setting out the terms of this Order no later than November 4, 1986. Further, Defendant was ordered to create, with the approval of the parties, an explanation of the Plaintiffs' rights under the Order. The Court ordered further deadlines for creating waiver forms, distributing waiver forms to the County Department of Family and Children Services and notifying former recipients of the terms of the Order. It is from these Orders that Defendant Ledbetter respectfully requests a stay pending appeal.

II. STATEMENT OF THE CASE

The facts in this case are not seriously in dispute. The Findings of Facts set out by the Court in its Order

of October 17, 1986 set forth the basic facts concerning this case.

III. ARGUMENT AND CITATION OF AUTHORITY

In this Motion pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, Defendant requests that this Court stay implementation of its Order pending a final resolution of this issue by the appellate court. Rule 62(c) provides that the Court may, in its discretion, suspend or modify an injunction during the pendency of the appeal. The standard for considering a Motion for Stay Pending Appeal is set out in the case of *Ruiz v. Estelle,* 650 F.2d 555, 565 (5th Cir. 1981), *cert. denied,* 460 U.S. 1042, as follows:

1. Whether the Movant has shown a likelihood of success on the merits.
2. Whether the Movant has made a showing of irreparable harm if the relief is not granted.
3. Whether other parties would be substantially harmed by the injunction.
4. Whether granting relief would serve the public interest.

A stay of an injunction pending appeal is especially appropriate to preserve the status quo pending appeal. *See Newton v. Consolidated Gas Co. of New York,* 258 U.S. 165, 177 (1922); *Pettway v. American Cast Iron Pipe Co.,* 411 F.2d 998, 1003 (5th Cir. 1969); 11 Wright & Miller, *Federal Practice and Procedure,* § 2904 (1973). Therefore, where the moving party is seeking to preserve the status quo ante, relief pursuant to Fed.R.Civ.P. 62(c) is appropriate.

A. DEFENDANT HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS WARRANTING A STAY PENDING APPEAL.

The case of *Ruiz v. Estelle,* 650 F.2d 555 (5th Cir. 1981), as modified in 666 F.2d 854 (5th Cir. 1982), addresses the issue of what the Movant must show to demonstrate a likelihood of success on the merits. The party who seeks a stay bears the burden of establishing these prerequisites.[1] The *Ruiz* Court held that:

> [O]n motions for stay pending appeal the movant need not always show a "probability" of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.

650 F.2d at 565; 666 F.2d at 856. This ruling is consistent with the holding in the case of *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,* 559 F.2d 841 (D.C. Cir. 1977). In the *Holiday Tours* case, the Court opted for a flexible analysis wherein a showing on the merits is balanced against the examination of the other three elements of the four-prong test. *Id.* at 845.

The *Holiday Tours* court noted that strict adherence to requiring substantial likelihood of success on the merits is not contemplated by Rule 8 of the Federal Rules of

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[1]In *Ruiz* the analysis involved F.R.A.P. 8, the appellate counterpart to Fed.R.Civ.P. 62(c). The analysis under both rules is essentially the same. *See Drummond v. Fulton County Department of Family and Children Services,* 532 F.2d 1001, 1002 (5th Cir. 1976).

Appellate Procedure which requires that motions ordinarily be made first to the district court. The court reasoned:

> Prior recourse to the initial decision-maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.

Id. at 844. Therefore, the movant must make a showing that the case involves a substantial and serious legal issue. The Court must then weigh the factor of substantial likelihood of success on the merits with the other factors in the case.

Defendant has a substantial likelihood of success on the merits in this case. The Court held that the statutory amendment implementing the standard filing unit rule was unconstitutional on two grounds. First, the Court found that the statute worked an unconstitutional taking without just compensation on the child support recipients. Secondly, the Court found that the family filing unit amendment abridges the substantive due process rights of the child support recipients Plaintiffs.

1. Defendant Has A Substantial Likelihood Of Prevailing On Appeal On The "Taking" Issue.

In addressing the "taking" issue, the Court stated in its Order that the child support recipient Plaintiffs had a property interest in the receipt of child support and suffered a diminution in the value of that property interest. However, the court acknowledged that this diminution did not automatically result in a taking without just com-

pensation. Order at 17. This Court went on to state in its Order:

> The Supreme Court has not developed any particular formula for determining when "justice and fairness" require compensation as a result of public action diminishing the value of private property. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). This determination usually depends upon the facts and circumstances of a particular case. *Id.* Indeed, it has been said that this determination is as much an exercise of the judgment of the court as it is a product of the application of logic. *Andrus v. Allard,* 444 U.S. 51, 65 (1979).

Id. Therefore, as this Court has acknowledged, questions of "taking without just compensation" are very much a subjective exercise in judgment of the judge asked to reach a decision. This case does not involve the application of an objective set of standards which the Court can employ. Had the Court decided this case on a question of statutory interpretation or some other objective criteria, the case would be more clear-cut with a greater likelihood that the appellate court would affirm. However, in this case, the appellate court may view the issue of just compensation differently from the trial court, even relying upon the same case law. In fact Defendant submits that the appellate court, when apprised of Defendant's position and when presented with briefs on the taking and substantive due process issues, will see the issue differently and will reverse.

The family filing unit rule does not affect an unconstitutional uncompensated taking. In this case, whatever diminution in property value the child support recipients sustain is not a direct eradication of a property right

There is no physical invasion or direct "taking" of property. As the Supreme Court has stated, "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government (citation omitted), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. 104, 124.

> The prohibition under the taking clause has been:
>
> [U]nderstood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals.

Omnia Commercial Co. v. United States, 261 U.S. 502, 510 (1923). The Supreme Court has consistently recognized the difference between direct and indirect interference with a property right. It is the direct interference with the protected right which is prohibited. *Gray Panthers v. Administrator, HCFA,* 566 F.Supp. 889, 893 (D.D.C. 1983). The family filing unit rule does not directly take from any child his child support monies. Whatever effect the rule has on the family is an indirect effect. This indirect and incidental effect on the child's ability to spend his support payments is the type of incidental effect which is not protected under the taking clause. Although a property owner may be deprived of some beneficial use of his property or his full exploitation of the property may be restricted, such incidental invasion upon that property right has been upheld if such public action is justified as promoting the general welfare. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163 (1980).

In *Seagraves v. Harris,* 629 F.2d 385, 392 (5th Cir. 1980), the Court of Appeals determined that the State collection of child support and distribution of welfare benefits in lieu thereof was consistent with due process. In the current case, where the family has voluntarily chosen to receive welfare benefits, the siblings required to be brought into the grant receive the benefit of the State's collection efforts for child support. This is, in part, compensation for whatever diminution in value of child support the child may sustain. Additionally, the fact that the child will receive Medicaid benefits acts as compensation for any diminution.

Therefore, Defendant Ledbetter submits that he has shown a likelihood of prevailing on the merits on the "taking" issue in this case. Any harm to the property rights of Plaintiff child support recipients is an incidental effect of the standard filing unit rule. Additionally, even if a "taking" occurs, there is just compensation.

2. Defendant Has A Substantial Likelihood Of Convincing The Appellate Court That The Substantive Due Process Rights Of Plaintiffs Are Not Violated.

In this Court's order of October 17, 1986, the Court found that the standard filing unit statute was violative of the substantive due process rights of plaintiffs. Order at 29-36. The Court found that the liberty interests of the Plaintiff child support recipients were violated by § 602 (a)(38). In so holding, the Court reasoned that the statute infringed upon the fundamental rights of this Plaintiff class in a direct and substantial manner and the Court therefore applied a heightened level of scrutiny to the standard filing unit amendment. Order at 31-35.

Defendant Ledbetter submits that he has a substantial likelihood of prevailing on the merits on appeal on this substantive due process issue. In its opinion, the Court relied upon the same line of cases concerning fundamental rights as those discussed by the Supreme Court in the recent case of *Bowers v. Hardwick*, 54 U.S.L.W. 4919 (U.S. June 30, 1986). The Court stated in *Hardwick* that it was not inclined to take a more expansive view of the Court's authority to discover new fundamental rights imbedded in the due process clause. *Id.* at 491. Justice White, writing for the majority, went on to state:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great reluctance to expand the substantive reach of those clauses [Due Process Clause of the Fifth and Fourteenth Amendment], particularly if it requires redefining the category or rights deemed to be fundamental.

Id. at 4921-22 (bracketed material supplied).

The *Hardwick* case, although certainly not dealing with the same or similar allegedly fundamental rights as are alleged in the current case,[2] does demonstrate the restrictive view which the Supreme Court takes of "fundamental rights". This approach is also demonstrated in the recent case of *Lyng v. Castillo*, — U.S. —, 106 S.Ct. 2727 (1986). In *Lyng*, food stamp recipients challenged food stamp amendments which required related persons

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[2]In *Hardwick*, the court found that there was no fundamental right to engage in sodomy.

living together to apply as a single household. The court found that the statutory classification does not directly and substantially interfere with family relationships and therefore did not involve fundamental rights. *Id.* Given the Supreme Court's recent pronouncements concerning the Court's reluctance to expand "fundamental rights", it is likely that Defendant Ledbetter will prevail on appeal on this issue.

In this case, this Court incorrectly imposed a higher level of scrutiny than that generally used in the context of social welfare legislation. Courts generally apply a minimal level of scrutiny for social welfare legislation. *Schweiker v. Hogan*, 457 U.S. 569 (1982); *Schweiker v. Wilson*, 450 U.S. 221 (1981). Social welfare legislation which is rationally related to legitimate governmental objectives is generally upheld by the courts. *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975).

In this case, the Court should have utilized this rational relationship test rather than the strict scrutiny review necessary when fundamental rights are involved. The current case does not involve the same type of rights as were protected in the "right of privacy" cases relied upon by the Court. These cases dealt with family issues such as right to marry, *Zablock v. Redhail*, 434 U.S. 374 (1977) and the right to control private decisions concerning procreation. *Carey v. Populations Services, International*, 431 U.S. 678 (1977) (restrictions on sales of contraceptives); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (mandatory maternity leave); *Griswold v. Connecticut*, 381 U.S. 479 (1965). These cases set out clear fundamental rights concerning marriage and

family which are very different from the right of the children in the current case to the, primarily financial, support of their non-custodial parent.

The other substantive due process cases relied upon by the Court also involve fundamentally different rights from those involved here. *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494 (1977) (housing ordinance restricting occupancy of dwelling to "single family" affecting family living arrangements); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise of religion restricted by compulsory school attendance); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) (compulsory school attendance); *Meyer v. Nebraska,* 262 U.S. 390 (1923) (prohibition of teaching of any modern language other than English to any child not beyond eighth grade).

In the current case the allegedly "fundamental right" is not of the type or character of the rights previously held to be fundamental in the cases cited by the court. The Court characterizes this right as the interest of the child in the support and nurturing of the absent parent who pays child support. Order at 32. However, as the Court acknowledged, this right has not previously been recognized as protected by the due process clause. *Id.* at 32. The deprivation of financial support which the named Plaintiffs in the current case suffer was being "forced to part forever with $9 apiece per month." (Order at 16). This can hardly be said to constitute a "fundamental right." Whether these children will lose nurturing and guidance from their non-custodial parent and have fewer contacts with that parent is not only entirely speculative, but it is entirely an indirect result, if it occurs at all, of the family filing unit regulation. Even assuming that constitutional rights are implicated by the family filing unit

rule, there is simply no direct and substantial interference with those rights. *See Lyng v. Castillo,* — U.S. —, 106 S.Ct. 2727, 2729 (1986).

This Court's determination of violation of substantive due process rights, similar to the taking issue, is entirely a subjective judgment by the Court. Substantive due process analysis, "presents the spectre of jurisprudence which depends upon the personal philosophy of a particular judge." Order at 30.[3] In this case where the statutory enactment is rationally related to a legitimate governmental objective, it is likely that the appellate court will find that no violation of substantive due process rights has occurred. Additionally, the effects upon the familial rights in this case are incidental and indirect, which is not the type of governmental activity generally held to violate substantive due process.

Defendant has demonstrated to the Court that this is a substantial legal issue. Further, Defendant has shown that there is a likelihood that this case will be reversed on the merits. Therefore, the first prong of the four part *Ruiz* test is met by Defendant, and this Court should grant a stay pending appeal.

B. DEFENDANT WILL SUFFER IRREPARABLE HARM IF A STAY IS NOT GRANTED.

The most obvious cost to the State in implementing this Court's Order while it is on appeal is the cost of

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[3]As the Supreme Court in *Hardwick* stated, "Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection."

actually paying increased benefits to the class members. These benefits, if the Court is reversed on appeal, would be in error and would have to be recouped by the Government. Recouping overpayments is at best a slow process. *See* Affidavit of Mary Jane Burns, attached hereto as Exhibit "1". The federal regulations restrict the amount of recoupment which can be made from a continuing AFDC grant. *Id.* If the family is no longer on assistance, recoupment is even more difficult. Therefore, recouping this money will be a slow, if not impossible, task.

These difficulties in recouping benefits once paid were acknowledged by Justice Rehnquist in his granting a stay pending appeal on certain issues in *Edelman v. Jordan*, 414 U.S. 1301. In his Opinion in Chambers, he stated, "If paragraph 5 of the judgment is not stayed, I would think it extremely unlikely that petitioner, should he succeed in this Court, would be able to recover funds paid out under that paragraph to respondent welfare recipient and members of the class he represents." *Id.* at 1302-1303.

The recoupment of potential overpayments is the most obvious harm to the State; however, it is not the only harm. More importantly, the State will incur in this case tremendous administrative costs in implementing this Court's Order. *See* Affidavit of Mary Jane Burns attached hereto, as Exhibit "1". This Court has ordered the State to do the following: to send notices to 90,000 potential plaintiffs, to answer thousands of telephone calls from potential plaintiffs, to sort out which of those callers fall within the *Baldwin* class, to explain their rights to class members, to allow the *Baldwin* potential class members to do an election as to whether they want their child included or not, to notify hundreds of caseworkers of the effects of *Baldwin*,

to print and distribute handouts explaining this case to potential *Baldwin* class members, to give these handouts to applicants, to find an alternative to either including or not including the child or to report to the Court as to why such alternative is not available, and to find a mechanism for locating persons who are not currently on assistance who may have been harmed by the family filing unit rule. The cost to the State for implementing all of these various items specified by the Court cannot be accurately calculated at this time, but will be substantial. *See* Exhibit "1". More importantly, this administrative cost to the State is absolutely irrecoverable, if the State is successful on appeal. Of course, the State can never assess against the Plaintiffs the administrative costs of this action. Therefore, this money will be expended to no avail if the State prevails on appeal and will be a tremendous waste of taxpayer dollars which could otherwise be used to the benefit of AFDC recipients.

Additionally, further administrative costs will be involved if the State is successful on appeal. That is, if the regulations are changed back to the current standard filing unit statute and regulations, the State must then reverse the entire process. See Exhibit "1". This will involve another tremendous administrative effort by the State. This entire system involves time taken away from other important issues. This time spent on this one regulation is therefore time taken away from other AFDC recipients whose needs should be addressed. Therefore, the harm to the State, although "merely financial" is tremendous and irreparable.

Part of the irreparable harm suffered by the State of Georgia will have already occurred at the time that this

Court rules on this Motion. Because of this Court's order issued orally on October 22, 1986, the State has already expended thousands of dollars which can never be recovered. However, granting a stay pending appeal at this junction would still serve some purpose.. It would prevent the payment of benefits which would be subject to the recoupment process if the State prevails on appeal. A stay would also prevent the State from spending even more time and money in reversing the implementation process if the appellate court rules in favor of Defendants.

C. THE GRANTING OF THE STAY WOULD NOT SUBSTANTIALLY HARM OTHER PARTIES IN THE CASE.

Defendant acknowledges that some Plaintiffs in this case sustain a financial harm as a result of the standard filing unit rule. However, this harm is not the type of harm which would outweigh the harm to the State which would result if the Court's order must be fully implemented pending appeal. The standard filing unit regulations have been in effect since October 1, 1984. The Complaint in this case was not filed until December 6, 1985. The Preliminary Injunction phase of the case was fully briefed by February 7, 1986 and all Motions for Summary Judgment were submitted by April 16, 1986. Therefore, the Plaintiffs were subject to the effect of the standard filing unit rule for over a year before even filing suit. Even after this suit was initiated, the standard filing unit rule remained in effect for ten months prior to this Court's order on October 17, 1986. Plaintiffs cannot therefore claim that the harm to them is immediate or irreparable.

Additionally, these Plaintiffs, unlike some welfare recipients, do have some alternative means of support.

That is, the family does have some income, through child support income, upon which it can rely while this case is appealed. Many of the recipients in this case were not receiving enough child support into the family grant unit under the standard filing unit rule to terminate the case from AFDC. This is illustrated in the case of Brenda Maffett. *See* Order at p. 13, n. 6. In those cases, some amount of an AFDC grant is still available to the family and many families have been living for the past two years on that level of assistance. Therefore, the harm to the Plaintiffs in this case is not an immediate harm.

There is some harm to the Plaintiffs in not granting the Defendant a stay in this case. That is, recipients of AFDC are not benefitted by regulations which change back and forth. If Defendants are forced to implement this Court's Order and then are successful on appeal and are forced to change back to the existing state of the law, Plaintiffs themselves have not benefitted, and have probably suffered, from that exercise in futility.

For these reasons, Defendant Ledbetter respectfully submits that the harm to Plaintiffs is not immediate or irreparable and that this harm does not outweigh the irreparable harm to Defendant which would result from implementation of this Court's Order pending appeal.

D. THE GRANTING OF THE STAY WOULD SERVE THE PUBLIC INTEREST

In this case, the public interest is served by implementing the intent of Congress until an appellate court can resolve the issue finally. Congress may choose to allocate limited governmental resources among those recipients of governmental benefits who are most needy.

Schweiker v. Hogan, 457 U.S. 569, 590 (1982). This allocation is a legitimate governmental concern and the public interest lies in insuring that the intent of Congress in this allocation process is carried out. In the current case, Congress has determined that children receiving AFDC who reside with siblings who receive child support payments are less needy and Congress has implemented its choice of allocation of resources in the standard filing unit rule. Given that this issue will be ultimately decided by the United States Supreme Court, it is in the public interest to see that the Congressional intent expressed in 42 U.S.C. § 602(a)(38) is carried out until final judicial disposition.[4]

Additionally, the public has an interest in the efficient management of the AFDC system. It is not in the public interest to have State caseworkers spending a great deal of time to implement an Order only to have caseworkers spending an equally great amount of time going back to the original state of the law if the State is successful on appeal. Therefore, the public's interest in having an efficient system of providing assistance payments is thwarted by requiring the State to implement this Order pending appeal. Additionally, the increased cost of the AFDC program for changing these cases and later changing them back is not in the best interest of the public.

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[4]The cases of *Gilliard v. Kirk,* 633 F.Supp. 1529 (W.D.N.C. 1986) and *Lesko v. Bowen,* No. 85-C-1600 (W.D. Wis. July 16, 1986) are currently on direct appeal to the Supreme Court pursuant to 28 U.S.C. § 1252. A jurisdictional statement was filed in *Lesko* on September 12, 1986 (No. 86-415) and in *Gilliard* on October 10, 1986 (No. 86-509). Therefore, the Supreme Court will address the issue shortly.

In this case, the nature of the court's order is to issue a mandatory injunction rather than a prohibitory injunction. That is, the actions of the State Defendant which are required by this Court's orders require significant changes in the current administration of the AFDC program pending appeal. The appropriateness of a stay pending appeal in the context of a mandatory injunction was addressed in *Heckler v. Lopez,* 463 U.S. 1328, 1333 (1983). In that case, the Secretary of Health and Human Services made a motion for partial stay pending appeal from a mandatory injunction requiring the federal government to immediately pay certain social security benefits. In his Opinion in Chambers granting the relief, Justice Rehnquist stated that the mandatory injunction requiring paying out of benefits, "significantly interferes with the distribution between administrative and judicial responsibility for enforcement of the Social Security Act which Congress has established." *Id.* at 1331. In the current case, the public interest will be harmed by the significant interference with the administration of the program and the implementation of the will of Congress required by this Court's injunction. Defendant Ledbetter submits that in this case, the public interest is best served by staying the enforcement of the order of this Court pending appeal.

IV. CONCLUSION

For the foregoing reasons, Defendant Ledbetter respectfully requests this Court to stay its Orders issued October 17, 1986 and October 22, 1986 pending the appeal of this case.

Respectfully submitted,

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Attorney General

H. PERRY MICHAEL 504000
First Assistant Attorney General

/s/ WILLIAM C. JOY 405500
Senior Assistant Attorney General

/s/ MARY FOIL RUSSELL 266960
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VERNITA BALDWIN, on behalf of herself and her minor children, WILNETTA BALDWIN, LAPHEITTA BALDWIN, and all others similarly situated,

Plaintiff,

v.

CIVIL ACTION
NO. C85-4340A

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources; and OTIS R. BOWEN, M.D., in his official capacity as Secretary of the United States Department of Health and Human Services,

Defendants

AFFIDAVIT OF MARY JANE BURNS

Personally appeared before the undersigned officer, duly authorized to administer oaths, MARY JANE BURNS, who being duly sworn, deposes and says as follows:

1.

This Affidavit is being given for use by the Defendant, James G. Ledbetter, Commissioner of the Georgia Department of Human Resources in support of Defendant's Motion For Stay Pending Appeal and for all other purposes authorized by law.

2.

I reside in DeKalb County, Georgia, and am employed by the Department of Human Resources, Division of Family and Children Services in Atlanta, Fulton County, Georgia.

3.

I am Chief of the Aid to Families With Dependent Children (AFDC) Unit within the Department of Human Resources, and my duties include formulating and implementing policy for the AFDC program.

4.

I have read this Court's Order of October 17, 1986, and have been informed of the further orders of this Court issued orally on October 22, 1986.

5.

Based upon this Court's Orders, the Department of Human Resources has begun the process of attempting to

identify potential members of the *Baldwin* class and to explain their rights under the Court's Orders and to have class members sign a form indicating their election.

6.

Many hours of State staff have been spent in printing and mailing 90,000 copies of a check insert included with the November AFDC checks. Overtime wages were authorized and paid in order to meet this deadline.

7.

Many hours of State staff have been spent in drafting, revising and printing 2850 copies of Eligibility Services County Letter No. 86-17, dated October 27, 1986.

8.

Many hours of State staff have been spent in drafting and revising a form entitled "Your Right To Exclude Children Who Have Child Support From Your Grant". This form contains information concerning this case and explains, in simple language, the recipient's constitutional rights and right to elect to exclude the child from the AFDC grant. The form also explains that if the recipient wishes to include the child, the recipient is voluntarily giving up both constitutional rights identified in this Court's Orders. This form further contains a waiver section which is to be signed by the applicant/recipient, the caseworker, and a witness. This form is currently being printed in the amount of 100,000 copies. The Department has authorized overtime wages to be paid to staff printing this form in order to meet the deadline.

9.

There are no figures at this time on how many class members exist. Therefore, accurate estimates of how many persons are affected cannot yet be made.

10.

It is anticipated that the AFDC check insert will be mailed on Friday, October 31, 1986. Recipients should begin receiving their checks on November 1, 1986. It is anticipated that beginning on November 3, 1986, the caseworkers in the 159 counties will begin receiving thousands of telephone calls concerning this notice. Caseworkers have been instructed to first identify whether the caller is in fact a member of the *Baldwin* class. This would require manually searching the case file or obtaining other information to determine whether that caller is a class member. If so, the worker must arrange an interview with the recipient to give the recipient a detailed explanation of the recipient's rights under the *Baldwin* Order. The worker is instructed to have the recipient read or read to the recipient the form entitled "Your Right To Exclude Children Who Have Child Support From Your Grant". The worker must then make manual budget calculations to determine potential impact on the AFDC grant and on Medicaid eligibility. The worker must obtain a decision from the recipient on whether to include or exclude that child or children from the grant and must have the recipient execute the waiver of constitutional rights section of the form. It is anticipated that this will involve a tremendous amount of caseworker time, since many recipients receive child support in varying amounts. It is anticipated that many persons who call will not actually be affected by the *Baldwin*

Order, if all children in the grant group receive child support from the same absent parent and excluding these children would eliminate the family's eligibility for AFDC entirely.

11.

Caseworkers have been instructed to maintain lists of *Baldwin* class members along with their election. A form entitled "Case of *Baldwin v. Ledbetter*/AFDC Cases Meeting Class Requirement" has been designed and printed for this tabulation. This form has been printed in the amount of 8,000 copies.

12.

Pursuant to this Court's Order, the Department is also in the process of printing 186,000 food stamp check inserts to be included with the December food stamp issuance, which will inform food stamp recipients, who may have been terminated from AFDC, of their rights under the *Baldwin* Order. The Department will print and issue fliers to be posted in each of the 159 county departments informing persons who have been terminated from AFDC of their rights under *Baldwin*. Further, the Department will issue press releases through its usual press channels informing persons who may have been terminated from AFDC of their rights under *Baldwin*. These inquiries will generate many telephone calls which will be handled by caseworkers as described above. Therefore, there will be additional state level manhours involved in printing, writing, revising, and distributing these additional materials and in processing these cases.

13.

If this Court orders actual implementation of the Order and changes must be made in the cases, caseworkers will be required to go back into each of the previously identified *Baldwin* case files and make manual changes in the file. This may involve further interviewing of the recipient. This will involve another tremendous amount of caseworker time.

14.

If the State of Georgia is ultimately successful in its appeal of this Court's Order, and the Court has ordered implementation to have occurred, the State is then responsible for collecting these amounts which would be overpayments. Federal regulations require that the state agency through the county departments collect overpayments promptly. 45 C.F.R. § 233.20(a)(13)(A). Collecting of overpayments would require the caseworker to compute the amount of the overpayment and to set up the overpayment on a recoupment schedule if the recipient were still on assistance. The schedule for recoupment is stated in 45 C.F.R. § 233.20(a)(13)(A)(2). This regulation requires that recovery of overpayments made from a grant must allow the family to retain income equal to not less than 90% of the state's payment standard. Under the restrictions of this regulation, collecting of overpayments is a very slow process. Many of the overpayments will never be collected. Additionally, if the family has for some reason gone off assistance, recouping of the overpayment will be extremely difficult, if not impossible. Additional caseworker time is involved in sending letters and making attempts to collect these overpayments.

15.

Once overpayment recoupment schedules are set up, the recoupment of overpayment is considered an adverse action and may be appealed through the administrative hearing process. This could involve many potential hearings, and potential appeals.

16.

The efforts already underway and the further efforts which this Court may order will cost the State of Georgia, and the Federal Government, as a part of its administrative costs of the program, an inordinate amount of money. The efforts made by caseworkers to implement this Order will take time away from other issues which they should be addressing and will have a negative impact on other work in the counties. If time taken away from other cases results in case errors, this results in an increased sanctionable error rate against the State. If the State of Georgia is ultimately successful on appeal, and the State has had to implement and then reverse the process, the administrative burden will be tremendously increased.

17.

I am over the age of majority and am competent to testify to the facts stated herein.

/s/ MARY JANE BURNS

Sworn to and subscribed
before me this 30th day
of October, 1986.
(SEAL)

LAURA J. JONES
NOTARY PUBLIC
My commission expires:
January 15, 1990.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing MOTION FOR STAY OF JUDGMENT PENDING APPEAL and BRIEF IN SUPPORT THEREOF, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Lisa J. Krisher, Esq.
Georgia Legal Services Program
P.O. Box 2185
Augusta, Georgia 30903

Phyllis J. Holemen, Esq.
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Jenny L. Mittelman, Esq.
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Jane Swift, Esq.
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75 Spring Street, S.W.
Atlanta, Georgia 30335

This 31st day of October, 1986.

/s/ MARY FOIL RUSSELL
Assistant Attorney General

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VERNITA BALDWIN, on behalf of herself and her minor children, WILNETTA BALDWIN, LAPHEITTA BALDWIN, and all others similarly situated,

Plaintiffs,

vs.

CIVIL ACTION
NO. C85-4340A

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources; and OTIS R. BOWEN, M.D., in his official capacity as Secretary of the United States Department of Health and Human Services,

Defendants.

ORDER

(Filed November 25, 1986)

This action is before the court on defendant Ledbetter's motion for stay of judgment pending appeal. Fed. R. Civ. P. 62(c). Such a stay is appropriate only if the movant shows: "(1) that the movant is likely to prevail on the merits on appeal; (2) that absent a stay the movant will suffer irreparable damage; (3) that the adverse party will suffer no substantial harm from the issuance of the stay; and (4) that the public interest will be served by

issuing the stay." *Garcia-Mir vs. Meese,* 781 F.2d 1450, 1453 (11th Cir. 1986) (citations omitted).[1]

Although the first factor is normally the most important in this analysis, it is not necessarily determinative. This court is not required to predict that it rendered an erroneous decision. *Washington Metropolitan Area Transit Commission vs. Holiday Tours, Inc.,* 559 F.2d 841, 844 (D.C.Cir. 1977). Instead, this court may grant a stay upon a lesser showing of a "substantial case on the merits" when "the balance of the equities weighs heavily in favor of granting the stay." *Garcia-Mir,* 781 F.2d at 1453 (quoting *Ruiz vs. Estelle,* 650 F.2d 555, 565 (5th Cir. 1981) (per curiam), *cert. denied,* 460 U.S. 1042 (1983)). With this standard in mind, the court will address the various factors *seriatim.*

I. THE LIKELIHOOD OF SUCCESS ON APPEAL.

Having wrestled with the issues raised on summary judgment in this case, the court is mindful of the difficult legal questions at issue. This court was convinced after exhaustive analysis that the AFDC family filing unit amendment does affect a taking without just compensation of a portion of the child support monies received by child support recipient plaintiffs. *See* Order of October 17, 1986, at 13-22. Moreover, this court was convinced that the AFDC family filing unit amendment abridges plaintiffs' substantive due process rights by directly and substantially interfering with fundamental rights identified in the relationship between the child support plaintiffs and non-custodial parents. *See id.*, at 31-36.

The court recognizes at the same time that these rulings upon these two issues are subject to legitimate debate. In particular, the court recognizes that an appellate court might substitute its judgment and conclude that the facts and circumstances of this case do not make out a taking. *See id.* at 17 (citing *Andrus vs. Allard,* 444 U.S. 51, 65 (1979)). An appellate court could also choose not to recognize the relationships identified by this court as fundamental or conclude that there is no substantial or direct interference with such relationships. *See Lyng vs. Castillo,* — U.S. —, 106 S.Ct. 2727, 2729 (1986) (citations omitted).

Because these legal questions are subject to debate, the court concludes that the movant does have a substantial case on the merits on appeal. *Garcia-Mir,* 781 F.2d at 1453. The court's attention must consequently focus on the extent to which the balance of equities identified in the remaining factors weighs heavily in favor of the movant. *Id.*

II. IRREPARABLE INJURY TO THE STATE.

The most prominent injury identified by movant is the payment of benefits which will occur if a stay is not imposed. This injury is clearly economic in nature, and it is well settled that such injuries do not, in and of themselves, constitute irreparable harm. *See Wisconsin Gas Company vs. F.E.R.C.,* 758 F.2d 669, 674 (D.C.Cir. 1985). The availability of an adequate remedy at law usually negates a showing that such an injury is irreparable. *Id.* It is undisputed that movant does have the remedy of recoupment in the event that this court's order is reversed upon appeal. *See* 42 USC § 602(a)(22)(A). Moreover, the

state may recover any overpayment to former recipients of AFDC by withholding the amount of the debt from the individual's tax refund, if any. *See* 42 USC § 602(a)(22)(B); O.C.G.A. § 48-7-161.

Having recognized the recovery measures available at law to the movant, such recovery will undoubtedly be difficult given the slow rate of recoupment allowed by law from current AFDC recipients and given the difficulty of recovering monies from impoverished persons. *Cf. Edelman vs. Jordan,* 414 U.S. 1301, 1302-03 (1973) (Rehnquist, J., Circuit Justice) (staying mandate and judgment of retroactive welfare payments). It is also clear that the state will incur certain administrative expenses in changing its *modus operandi.* These expenses will be exacerbated in the event that this court's order is reversed on appeal.

In sum, although the court cannot describe the injury to the movant as irreparable in light of the recovery remedies available to the state, the difficulty of such recovery coupled with the administrative expenses which the state will undoubtedly incur convinces the court that the equities weigh in favor of the movant when its injury is considered.

III. SUBSTANTIAL INJURY TO THE ADVERSE PARTY.

The movant insists that members of the plaintiff class would not be substantially harmed by the granting of a stay because their economic status in the absence of a stay will be no different from their economic status since the implementation of the amendment. The court recognizes that this may be true in the abstract. The court also recog-

nizes that plaintiffs may well be able to recoup any benefits not paid pending appeal. *See Wisconsin Hospital Association vs. Reivitz,* 630 F. Supp. 1015, 1019-21 (E.D. Wis. 1986). Yet, without more evidence this court cannot conclude that members of the plaintiff class such as the Baldwins will not be substantially harmed in the interim by the absence of benefits occasioned by the deeming of child support monies.

Even if the record provided a basis for concluding that members of the plaintiff class would not be substantially harmed in their family finances, this conclusion ignores the intangible harm which will undoubtedly occur if this court's judgment is stayed. The effect upon the hearts and minds of child support recipient plaintiffs and upon the bond which they enjoy with their non-custodial parent will be substantially harmed so long as child support recipients are forced to become wards of the state and their non-custodial parents are driven away by the prospect of supporting someone else's children. *See* Order of October 17, 1986, at 33-35.

For the foregoing reasons, the court concludes that members of the plaintiff class will be substantially harmed by issuance of a stay.

IV. THE PUBLIC INTEREST.

The public interest factor is largely dependent upon the previous two factors. There can be no dispute that the absence of a stay may result in the vain expenditure of public funds. On the other hand, the public interest is not served so long as the lives of plaintiffs are adversely affected by an arguably unconstitutional law. The lives of

such members of the public are at least as important as a public fisc. With these observations in mind, the court concludes that there is a balance of the equities on the question of whether a stay would serve the public interest.[2]

V. CONCLUSION.

The court concludes that movant has made a showing of a substantial case on the merits on appeal. However, the balance of the equities identified in factors two through four do not weigh heavily in favor of the movant. Rather, these equities are equally balanced. For this reason, defendant Ledbetter's motion for stay of judgment pending appeal is DENIED.

SO ORDERED, this 24th day of November, 1986.

/s/ J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

FOOTNOTES

---

[1] While the analysis of these factors was made by the Eleventh Circuit in the context of a motion filed under Fed. R. App. P. 8(a), the analysis under Fed. R. Civ. P. 62(c) is similar. *Drummond vs. Fulton County Department of Family and Children Services,* 532 F.2d 1001, 1002 (5th Cir. 1976).

[2] The movant's citation of Justice Rehnquist's opinion in *Heckler vs. Lopez,* 463 U.S. 1328 (1983) (Rehnquist, J., Circuit Justice) is inapposite. The movant seems to suggest that the identification process commenced during conference in chambers on October 21, 1986 "significantly interferes with the distribution between administrative and judicial responsibility for" the administration of the AFDC program. *Id.* at 1331. Yet, the court did not mandate the specifics of this identification process. Unlike the district court order at issue in *Heckler vs. Lopez,* this court merely suggested methods by which members of the class could be identified and their choices made. Recognizing the dilemma in which the movant was placed as it

planned an appeal and the filing of this motion but was constrained by the immediate prohibitory nature of this court's permanent injunction, this court allowed the movant to postpone actual implementation if it would undertake some kind of identification process. In this way, the court sought to accomodate the dilemma in which the state found itself and yet expedite actual implementation in the event of an unfavorable ruling on the instant motion. To suggest that this court undertook an ambitious administrative role is to grossly misstate the record and to ignore that the specifics of the identification process contained in this court's order of November 18, 1986 were the result of a compromise rather than a unilateral, ambitious mandate.

APPENDIX G

NO. ————

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAMES G. LEDBETTER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE GEORGIA DEPARTMENT OF HUMAN RESOURCES,

Applicant

v.

VERNITA BALDWIN, ON BEHALF OF HERSELF AND HER MINOR CHILDREN, WILNETTA BALDWIN, LAPHEITTA BALDWIN, AND ALL OTHERS SIMILARLY SITUATED,

Respondents

APPLICATION FOR STAY ON APPEAL OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

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(Table of Contents and Table of Authorities
Omitted in Printing)

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JAMES G. LEDBETTER,
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Applicant

v. NO.

VERNITA BALDWIN, ON
BEHALF OF HERSELF AND
HER MINOR CHILDREN,
WILNETTA BALDWIN,
LAPHEITTA BALDWIN, AND ALL
OTHERS SIMILARLY SITUATED,

Respondents

APPLICATION FOR STAY ON APPEAL

(Received December 11, 1986)

To the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, and Circuit Justice for the Eleventh Circuit:

Applicant James G. Ledbetter, in his official capacity as Commissioner of the Georgia Department of Human

Resources, files this Application for Stay On Appeal. Applicant James G. Ledbetter has filed a Notice of Appeal to this Court from the Final Order and Judgment entered in this action on October 17, 1986, by the United States District Court for the Northern District of Georgia, attached hereto as Attachment "A". Applicant also appealed the oral modification of the order announced by the district court on October 22, 1986, and reduced to an order filed November 18, 1986, attached hereto as Attachment "B". This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101. In its order entered October 17, 1986, the court held 42 U.S.C. § 602(a)(38) to be unconstitutional. Appeal therefore is appropriate directly to this Court pursuant to 28 U.S.C. § 1252.

I. INTRODUCTION AND STATEMENT OF THE CASE

This case involves a challenge by respondents to regulations promulgated by the Georgia Department of Human Resources in compliance with § 2640(a) of the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 1145 (1984) (codified at 42 U.S.C. § 602(a)(38)) and implementing federal regulations found at 45 C.F.R. § 206.10(a)(1)(vii)(B). Respondents were required by 42 U.S.C. § 602(a)(38) to include their children who received child support income in their public assistance grant group along with their other children who were already receiving assistance payments. In the court's order issued October 17, 1986, the court found that because § 602(a)(38) effects a taking without just compensation and abridges the substantive due process rights of the respondents who receive child support, the statute was unconstitutional. The district court enjoined Applicant from enforcing the regulations implementing this statute. Attachment "A" at 38.

The facts in this case are not in dispute. The facts as to the application of 42 U.S.C. § 602(a)(38) to the named respondents are adequately set out in the district court's order. Attachment "A" at 2-7. These facts reveal that the Baldwin family sustained a decrease in total family income after implementation of 42 U.S.C. § 602(a)(38) from $374 per month to $314 per month. However, respondents Wilnetta and Lapheitta Baldwin received the benefits of the state's child support enforcement program (see 42 U.S.C. §§ 602(a)(27), 651 *et seq*) and received Medicaid benefits. *See* 42 U.S.C. § 1396a(10), Attachment "A" at 5, 21. The facts concerning Respondent Brenda Maffett and her children show that the Maffett family did not sustain any decrease in family income as a result of the application of 42 U.S.C. § 602(a)(38). The child included in the Maffett family's AFDC grant also receives child support enforcement services and Medicaid benefits. Attachment "A" at 6-7.

Respondents brought this complaint for declaratory and injunctive relief on December 6, 1985. Respondents' motion for preliminary injunction and all responses were filed by February 7, 1986. Cross-motions for summary judgment by all parties were filed by April 16, 1986. The court issued the order which is the subject of this appeal on October 17, 1986. In its October 17th order, the court ordered Applicant to inform all class members of their rights under the order by way of a notice to be included with AFDC checks delivered during the month of November, 1986, and by notice to any families whose benefits have been terminated as a result of the standard filing unit statute. In its order of November 18, 1986, the court further delineated the steps which Applicant was required

to take to notify class members of the terms of the court's order. It is from these orders that Applicant Ledbetter respectfully requests a stay pending appeal.

Applicant filed his Motion For Stay of Judgment Pending Appeal before the United States District Court for the Northern District of Georgia on October 31, 1986. Applicant requested an order staying enforcement of the court's original order pending resolution of the case upon appeal. Applicant further requested a stay from the court's order orally on October 22, 1986, and reduced to writing by order entered November 18, 1986. A copy of the Motion with exhibits made to the district court is attached hereto as Attachment "C".

In an order entered November 25, 1986, and received by Applicant December 1, 1986, the district court denied Applicant's Motion For Stay of Judgment Pending Appeal. A copy of the court's order denying Applicant's Motion is attached hereto as Attachment "D".

II. STATUTORY AND REGULATORY BACKGROUND

Applicant James G. Ledbetter is the Commissioner of the Georgia Department of Human Resources. The Department through its Division of Family and Children Services, administers the Aid To Families With Dependent Children (AFDC) program in the State of Georgia. The AFDC program is a joint federal and state program created by the enabling statute found at Title IV, part A of the Social Security Act, codified at 42 U.S.C. § 601 *et seq.* States which choose to participate in the program must operate their AFDC programs in a manner consistent with the federal statute. *Rosado v. Wyman,* 397 U.S. 397, 408 (1970).

The statute in question in this litigation is part of the federal statute which prescribes what the state must assure in its state plan which is found at 42 U.S.C. § 602. This provision was enacted by Congress as § 2640(a)(38) of the Deficit Reduction Act of 1984, codified at 42 U.S.C. § 602(a)(38). The provision is frequently referred to as the "standard filing unit" or "family filing unit" provision.

42 U.S.C. § 602(a)(38) provides that the State in its state plan must:

> (38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j), in the case of benefits provided under Title II).

The federal and state regulations in the AFDC program implement this requirement. *See* 49 Fed. Reg. 35586, 35599, September 10, 1984, to be codified at 45 C.F.R. § 206.10 (a)(1)(vii); Georgia Department of Human Resources County Letter 84-44, Attachment "A" at 4-5.

The effective date of § 602(a)(38) was October 1, 1984. Prior to that date, a recipient of AFDC benefits

could choose which children would be brought into the AFDC grant group to receive benefits. Under this previous policy, a mother could receive AFDC on behalf of herself and, for example, two children, while excluding from the group a third child who also resided in the household but who was receiving some type of income, for example, child support. In so doing, the family could maximize its benefits, since the income of the excluded child was not computed in the family's income in considering the AFDC grant. 42 U.S.C. § 602(a)(38) changed the previous policy by requiring all parents and siblings living in the same household with an eligible AFDC recipient to be included, along with any available income, in the grant group so that a determination could be made regarding the eligibility of the entire household for AFDC benefits. In implementing this regulation Congress intended to treat the income of all members of the household as available to the AFDC recipients, thereby requiring the family to use income available to it as its primary resource rather than public welfare benefits. S. Rep. No. 169, 98th Cong., 2d Sess. 908 (1984).

III. REASONS FOR GRANTING STAY ON APPEAL

The general standards governing an application for stay on appeal are as follows:

(1) There must be a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction.

(2) There must be a significant possibility of reversal of the lower court's decision.

(3) There must be a likelihood that irreparable harm will result if the decision is not stayed. *Times-Picayune Publishing Corp. v. Schulingkamp,* 419 U.S. 1301 (1974) (Powell, J. in chambers).

Applicant submits that in this case the criteria for granting a stay are met and that a stay on appeal should be granted. Applicant requests a stay pending the Court's decision on the notation of probable jurisdiction and pending the ultimate resolution by the Court.

A. There Is A Significant Possibility That The Court Will Note Probable Jurisdiction In This Case And Will Reverse The Lower Court's Decision.

This case is before the Court pursuant to 28 U.S.C. § 1252 on a direct appeal. The initial question in considering an application for stay is whether there is a reasonable probability that four members of the Court will consider the issues sufficiently meritorious to grant certiorari or to note probable jurisdiction. *Graves v. Barnes,* 405 U.S. 1201, 1203 (1972) (Powell, J. in chambers). In cases on direct appeal, the focus is on whether a majority of the Court is likely to reverse. As stated in *Graves:*

> As a threshold consideration, Justices of this Court have consistently required that there be a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. . . . Of equal importance in cases presented on direct appeal—where we lack the discretionary power to refuse to decide the merits—is the related question whether five justices are likely to conclude that the case was erroneously decided below.

Id. at 1203 (citations omitted).

The cases of *Gilliard v. Kirk,* 633 F. Supp. 1529 (W.D.N.C. 1986) and *Lesko v. Bowen,* No. 85-C-1600 (W.D. Wis. July 16, 1986) which involved basically the same issues as in this case are currently pending on direct appeal to this Court pursuant to 28 U.S.C. § 1252. A jurisdictional statement was filed in *Gilliard v. Kirk,* No. 86-509, on October 10, 1986, and this Court noted probable jurisdiction in an order entered December 8, 1986. A jurisdictional statement was filed in *Lesko* on September 12, 1986 (No. 86-415). Therefore, similar issues involved in this case will be resolved soon by this Court and will be fully briefed and heard. Additionally, both the district courts in *Gilliard* and *Lesko* granted stays pending appeal. See orders attached as Attachments "E" and "F". Therefore, the states of North Carolina and Wisconsin have not yet been required to change their AFDC programs as a result of the adverse decisions in *Gilliard* and *Lesko.*

Given the noting of probable jurisdiction in *Gilliard,* the focus here should be upon whether the Court is likely to reverse the decision of the district court. The district court held that the statutory amendment implementing the standard filing unit rule was unconstitutional on two grounds. First, the court found that the statute worked an unconstitutional taking without just compensation on the child support recipients. Secondly, the court found that the family filing unit amendment abridges the substantive due process rights of the child support recipient respondents. Applicant submits that on both grounds there is sufficient likelihood that this Court will reverse the lower court's decision.

1. Applicant Has A Probability Of Success On the Merits On The "Taking" Issue.

In addressing the "taking" issue, the district court stated in its order that the respondents who were child support recipients had a property interest in the receipt of child support and suffered a diminution in the value of that property interest. In the view of the district court, the sub-class of respondents who receive child support have a property right in those child support payments. Attachment "A" at 14-15. The court then analyzed the diminution in value which actually occurred in the case of the Baldwin family. The court reasoned:

> Prior to the implementation of the amendment, Wilnetta and Lapheitta Baldwin each had a right to enjoy the benefit of $100 of the total $200 per month paid by their father in child suport payments. Because the first $50 paid in child support is disregarded, these children retain a right to $25 each per month in child support payments. However, because the remaining $150 is now paid to the Baldwin family in satisfaction of the $264 payment standard for a family of four, Wilnetta and Lapheitta Baldwin can no longer demand their share of this money. Although they previously had a right to $75 apiece, they now have a right only to a pro rata share of the $264 AFDC family budget for a family of four, or a right to $66 apiece. Consequently, under the operation of the amendment, Wilnetta and Lapheitta Baldwin each contribute $75 apiece to the family unit, but receive only $66 apiece from the family unit. Despite the absence of any obligation to support their co-resident siblings or their custodial parent, they are forced to part forever with $9 apiece per month, which is used to pay for the maintenance of the rest of the family unit.

Attachment "A" at 16. The court went on to hold that this nine dollar diminution in value amounted to an unconstitutional "taking" of the property of these respondents. The court then determined that this "taking" was without just compensation, and ruled that "Defendants may not enforce the amendment [42 U.S.C. § 602(a)(38)] without compensating such child support recipients in cash." Id. at 22.

Applicant submits that the analysis of the district court under the takings clause of the Fifth and Fourteenth Amendments is an erroneous interpretation of the takings clause and that there is a likelihood that this court will reverse the district court on this issue. First, there is some question as to whether respondent child support recipients have a property right in their child support payments. Under Georgia law, child support between private parties is a matter of a statutory legal obligation owed by the parent to the child during the child's minority. O.C.G.A. §§ 19-7-2, 24. Therefore, the payment of child support is in the nature of a satisfaction of a statutory obligation of support.[1] This duty of parental support ceases upon the death of the parent, *Clavin v. Clavin*, 238 Ga. 421, 233 S.E.2d 151 (1977), and no "property right" survives in the child to collect support payments from the parent's estate. Although the district court properly noted that *Collins v. Collins*, 172 Ga. App. 748, 324

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[1]In the case of respondents who receive public assistance, O.C.G.A. § 19-11-5 illustrates that the child support obligation is in satisfaction of the statutory duty of support created in O.C.G.A. §§ 19-7-2, 24. Section 19-11-5 provides, in pertinent part, that "the payment of public assistance to or on behalf of a child creates a debt due and owing the state by the parent or parents responsible for the support of the child."

S.E.2d 475 (1984), does hold that divorce does not terminate the duty of support, the court in *Collins* was not relying on "property rights" of the child but on the statutory duty which obligated the parent to support the child. Therefore, the district court's conclusion equating these child support payments with "property rights" is questionable.

Assuming that property right of respondents are implicated, the family filing unit rule does not work an unconstitutional taking of the property of respondents. In this case, whatever diminution in property value the child support recipients sustain is not a direct eradication of a property right. There is no physical invasion or direct "taking" of property. As this Court has stated, "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government (citation omitted), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).

The prohibition under the takings clause has been:

> [U]nderstood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals.

Omnia Commercial Co. v. United States, 261 U.S. 502, 510 (1923). This Court has consistently recognized the difference between direct and indirect interference with a property right. It is the direct interference with the protected

right which is prohibited. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163-165 (1980).

The family filing unit rule does not directly take from any child his child support monies. Whatever effect the rule has on respondents who receives child support is an indirect effect. This indirect and incidental effect on the child's ability to spend his support payments is the type of incidental effect which is not protected under the takings clause. Although a property owner may be deprived of some beneficial use of his property or his full exploitation of the property may be restricted, such incidental invasion upon that property right has been upheld if such public action is justified as promoting the general welfare. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163 (1980).

In *Andrus v. Allard,* 444 U.S. 51 (1979), this Court considered the taking clause in the context of an indirect restriction by government of the use of private property. In holding that the statute in question did not violate the takings clause, the Court stated:

> Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase.* "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922); see *Penn Central, supra* at 124.

Id. at 65

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1977), the Court observed that whether a particular restriction is rendered invalid depends upon the particular circumstances of the case. *Id.* at 124. Some of the factors which the Court examines in a case under the takings clause are the economic impact of the governmental restriction on property and whether the restriction reasonably promotes the health, safety, or general welfare. *Id.* at 124-125. In the current case, the economic impact on individuals is small. Using the district court's analysis, each of the *Baldwin* child support recipients suffers a loss of nine dollars. Attachment "A" at 17. The other family named in this action (the Maffetts) sustain no financial loss at all.[2] Additionally, the statute is related to important public concerns. Congress may choose to allocate limited governmental resources among those recipients of governmental benefits who are most needy. *Schweiker v. Hogan*, 457 U.S. 569, 590 (1982).[3] The family filing unit statute was enacted as part of the Deficit Reduction Act. As the legislative history of the Act reveals, Congress intended to promote the general welfare by targeting benefits to those most in need. *See* S. Rep. No. 169, 98th Cong., 2d Sess. 908 (1984). In enacting 42 U.S.C. § 602(a)(38), Congress plainly intended that families rely on independent sources of income before using scarce public resources.

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[2]AFDC families are entitled to a fifty-dollar child support disregard pursuant to 42 U.S.C. § 602(a)(8)(A)(vi). Because Melissa Maffett received only $40 per month in child support, the disregard negates the impact which $40 in income would otherwise have on the grant amount. See Attachment "A" at 6-7, n. 6.

[3]Although the impact upon individual recipients is small, the aggregate of these savings over all recipients could result in substantial savings to the overall program.

Assuming arguendo that the current facts constitute a "taking" of property, just compensation is provided. In several ways, the respondents are compensated for any diminution in value which they sustain. When respondent child support recipients are brought into the grant group, they are required to assign their support rights to the state. 42 U.S.C. § 602(a)(26)(A). After the first fifty dollars of child support is disregarded from the grant, 42 U.S.C. § 602(a)(8)(A)(vi), the remaining payments made by the absent parent go to reimburse the state for public assistance. Through the operation of this assignment, respondents are provided with two benefits. First, their financial support is generated from a constant and stable source, i.e., the state and federal welfare budgets. The respondents' welfare benefits are less likely to be terminated or reduced than are support payments from an absent parent, who may cease payments due to inability or unwillingness to pay. In conjunction with this benefit, the recipient receives the benefit of the state's collection efforts under the child support enforcement program if the absent parent discontinues his payment of support. See 42 U.S.C. §§ 602(a)(27), 651 *et seq.*

In addition to support collection benefits, respondents receive coverage under the Medicaid program by virtue of being included in the AFDC grant group. See 42 U.S.C. § 1396(a)(10). This Medicaid coverage could be worth a great deal in the event of serious illness to the recipient child. The support enforcement mechanism and Medicaid coverage provide ample compensation to respondents who are child support recipients for any diminution in property value which they sustain. Therefore, Applicant Ledbetter submits that he has shown a likelihood of

prevailing on the merits on the "taking" issue in this case. Any harm to the property rights of Respondent child support recipients is an incidental effect of the standard filing unit rule and is not a compensable governmental "taking" of property. Additionally, even if a "taking" occurs, there is just compensation.

2. There Is A Significant Likelihood That This Court Will Reverse On The Substantive Due Process Issue.

In the trial court's order of October 17, 1986, the court found that the standard filing unit statute was violative of the substantive due process rights of respondents. Attachment "A" at 29-36. The court found that the liberty interests of the respondent child support recipients were violated by § 602(a)(38). In so holding, the court reasoned that the statute infringed upon the fundamental rights of this class of respondents in a direct and substantial manner and the court therefore applied a heightened level of scrutiny to the standard filing unit amendment. Attachment "A" at 31-35.

Applicant submits that there is a significant likelihood that this Court will reverse on this substantive due process issue. In its opinion, the district court relied upon the same line of cases concerning fundamental rights as those discussed by this Court in the recent case of *Bowers v. Hardwick*, 478 U.S. —, 106 S. Ct. 2841, 92 L. Ed.2d 140 (1986). This Court stated in *Hardwick* that it was not inclined to take a more expansive view of the Court's authority to discover new fundamental rights imbedded in the due process clause. *Id.* at 148. Justice White, writing for the majority, went on to state:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution . . . . There should be, therefore, great reluctance to expand the substantive reach of those clauses [Due Process Clause of the Fifth and Fourteenth Amendment], particularly if it requires redefining the category or rights deemed to be fundamental.

Id. at 148 (bracketed material supplied).

The *Hardwick* case, although certainly not dealing with the same or similar allegedly fundamental rights as are alleged in the current case,[4] does demonstrate the view which the Supreme Court takes of "fundamental rights". This approach is also demonstrated in the recent case of *Lyng v. Castillo*, 477 U.S. —, 106 S.Ct. 2727 (1986). In *Lyng*, food stamp recipients challenged food stamp amendments which required related persons living together to apply as a single household. The Court found that the statutory classification does not directly and substantially interfere with family relationships and therefore did not involve fundamental rights. *Id.* Given this Court's recent pronouncements concerning the Court's reluctance to expand "fundamental rights", it is likely that this Court will reverse on this issue.

In this case, the district court incorrectly imposed a higher level of scrutiny than that generally used in the context of social welfare legislation. Courts generally apply a minimal level of scrutiny for social welfare legislation. *Schweiker v. Hogan*, 457 U.S. 569 (1982); *Schweiker*

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[4]In *Hardwick*, the Court found that there was no fundamental right to engage in sodomy.

v. Wilson, 450 U.S. 221 (1981). Social welfare legislation which is rationally related to legitimate governmental objectives is generally upheld by the courts. *Weinberger v. Salfi,* 422 U.S. 749, 772 (1975).

Given that no fundamental rights were involved, the rational relationship test should have been employed by the trial court in this case. The current case does not involve the same type of rights as were protected in the "right of privacy" cases relied upon by the trial court. These cases dealt with family issues such as right to marry, *Zablocki v. Redhail,* 434 U.S. 374 (1978), and the right to control private decisions concerning procreation. *Carey v. Populations Services, International,* 431 U.S. 678 (1977) (restrictions on sales of contraceptives); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974) (mandatory maternity leave); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (statute presenting use of contraceptives). These cases set out fundamental rights concerning marriage and family which are very different from the right of the children in the current case to the primarily financial support of their non-custodial parent.[5]

The other substantive due process cases relied upon by the district court also involve fundamentally different

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[5]While the trial court speculates as to the nurturing and emotional support provided by the absent parent to his children, the court's reasoning is faulty on two counts. First, the existence of any support other than financial support is mere speculation by the court. In the Baldwin family, it is difficult to imagine a great deal of nurturing given that the absent parent is in Kentucky while the children are in Georgia. Secondly, the record does not support the court's conclusory statements that the absent parent will cease providing such nurturing when the children are included in the AFDC grant.

rights from those involved here. *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494 (1977) (housing ordinance restricting occupancy of dwelling to "single family" affecting family living arrangements); *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (free exercise of religion restricted by compulsory school attendance); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) (compulsory school attendance); *Meyer v. Nebraska,* 262 U.S. 390 (1923) (statute prohibiting the teaching of any modern language other than English to any child not beyond eighth grade).

In the current case the allegedly "fundamental right" is not of the type or character of the rights previously held to be fundamental in the cases decided by this Court. The district court characterized this right as the interest of the child in the support and nurturing of the absent parent who pays child support. Attachment "A" at 32. However, as the district court itself acknowledged, this right has not previously been recognized as protected by the due process clause. *Id.* at 32; Attachment "D" at 3. The deprivation of financial support which the named respondents in the current case suffer was being "forced to part forever with $9 apiece per month." Attachment "A" at 16. This can hardly be said to constitute a "fundamental right." Whether these children will lose nurturing and guidance from their non-custodial parent and have fewer contacts with that parent is not only entirely speculative, but it is soley an indirect result, if it occurs at all, of the family filing unit regulation. Even assuming that constitutional rights are implicated by the family filing unit rule, there is simply no direct and substantial interference with those rights. *See Lyng v. Castillo,* — U.S. —, 106 S. Ct. 2727, 2729 (1986).

In this case where the statutory enactment is rationally related to a legitimate governmental objective, it is likely that this Court will find that no violation of substantive due process rights has occurred. Additionally, the effects upon the familial rights in this case are incidental and indirect. Applicant has demonstrated to the Court that this is a substantial legal issue. Further, applicant has shown that there is a likelihood that this case will be reversed on the merits on both the taking and the substantive due process issues. As such, Applicant respectfully requests that this Court grant a stay pending appeal.

B. Applicant Will Suffer Irreparable Harm If a Stay Is Not Granted.

The most obvious cost to Applicant in implementing the district court's order while it is on appeal is the cost of actually paying increased benefits to the class members. These benefits, if the case is reversed on appeal, would be in error and would have to be recouped by the Government. Recouping overpayments is at best a slow process. *See* Affidavit of Mary Jane Burns, attached to Attachment "C" as Exhibit "1", at ¶ 14. The federal regulations restrict the amount of recoupment which can be made from a continuing AFDC grant to allow the family to retain income equal to not less than 90% of the state's payment standard. 45 C.F.R. § 233.20(a)(13)(A)(2). If the family is no longer on assistance, recoupment is even more difficult. Therefore, recouping this money will be a slow, if not impossible, task. See Attachment "C", Exhibit "1" at ¶ 14.

These difficulties in recouping benefits once paid were acknowledged by Justice Rehnquist in his granting a stay pending appeal on certain issues in *Edelman v. Jordan,* 414 U.S. 1301 (1973). In his Opinion in Chambers. he stated, "If paragraph 5 of the judgment is not stayed, I would think it extremely unlikely that petitioner, should he succeed in this Court, would be able to recover funds paid out under that paragraph to respondent welfare recipient and members of the class he represents." *Id.* at 1302-1303. *See also Heckler v. Turner,* 468 U.S. 1305, 1308 (1983) (Rehnquist, J., in chambers).

The recoupment of potential overpayments is the most obvious harm to the State; however, it is not the only harm. More importantly, the State has incurred and will continue to incur tremendous administrative costs in implementing the district court's order. *See* Affidavit attached to Attachment "C" as Exhibit "1".[6] This administrative cost to the State is absolutely irrecoverable, if the State is successful on appeal. Of course, the State can never assess against the Plaintiffs the administrative costs of this ac-

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[6]The district court ordered the State to do the following: to send notices to 90,000 potential plaintiffs and to determine which recipients fall within the *Baldwin* class, to explain their rights to class members, to allow the *Baldwin* potential class members to do an election as to whether they want their child included or not, to notify caseworkers of the effects of *Baldwin,* to print and distribute handouts explaining this case to potential *Baldwin* class members and to give these handouts to applicants, and to find a mechanism for locating persons who are not currently on assistance who may have been harmed by the family filing unit rule. Most of this administrative action has already been taken. See Affidavit attached hereto as Exhibit "G". The cost to the State for implementing all of these various items specified by the court cannot be accurately calculated at this time, but will be substantial. See Attachment "C", Exhibit "1".

tion. Therefore, this money will be expended to no avail if the State prevails on appeal and will be a tremendous waste of taxpayer dollars which could otherwise be used to the benefit of AFDC recipients.

Applicant has already been required by the district court to take extensive measures to identify the class members. To comply with the court's order of November 18, 1986, applicant is continuing his efforts to find the class members and notify them of their potential rights. However, further administrative costs will be involved if the State is successful on appeal. That is, if the regulations are changed back to the current standard filing unit statute and regulations, the State must then reverse the entire process. See Attachment "C", Exhibit "1". This will involve another tremendous administrative effort by the State. This entire process involves time taken away from other important issues. The time spent on this regulation is therefore time taken away from other AFDC recipients whose needs should be addressed. Therefore, the harm to the State, although "merely financial" is tremendous and irreparable.

Part of the irreparable harm suffered by the State of Georgia will have already occurred at the time that this Court rules on this Motion. Because of the district court's orders, the State has already expended thousands of dollars which can never be recovered. However, granting a stay pending appeal at this juncture would still serve an important purpose. It would prevent the payment of benefits which would be subject to the recoupment process if the Applicant prevails on appeal. A stay would also prevent Applicant from spending even more time and

money in reversing the implementation process if this Court ultimately rules in favor of applicants.

Applicant acknowledges that some respondents in this case sustain some financial harm as a result of the standard filing unit rule. However, the standard filing unit regulations have been in effect since October 1, 1984. The Complaint in this case was not filed until December 6, 1985. The Preliminary Injunction phase of the case was fully briefed by February 7, 1986 and all Motions for Summary Judgment were submitted by April 16, 1986. Therefore, the respondents were subject to the effect of the standard filing unit rule for over a year before filing suit. Even after this suit was initiated, the standard filing unit rule remained in effect for ten months prior to the district court's order on October 17, 1986. Additionally, these respondents, unlike some welfare recipients, do have some alternative means of support. That is, the family does have some income, through child support income, upon which respondents can rely while this case is appealed.[7] In most cases, some amount of an AFDC grant is still available to the family and many families have been living for the past two years on that reduced level of assistance. Therefore, the harm to the respondents in this case is not an immediate harm.

It is important to note that the notices sent to current AFDC recipients were designed to inform recipients of

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[7]Many of the recipients in this case were not receiving enough child support for a child included under the standing filing unit rule to terminate or reduce the AFDC grant. This is illustrated in the case of Brenda Maffett. *See* Attachment "A" at p. 13, n. 6.

the *possibility* of changes being made in the future in their cases. See Attachment "B" at 3. Notification methods designed to reach former recipients were similarly phrased. See Affidavit attached hereto as Attachment "G". Because the district court was made aware that Applicant intended to seek a stay pending appeal, all notices were phrased to notify of possible changes rather than of any immediate right to have the *Baldwin* case applied to individual AFDC cases. The purposes of the notification and identification process was to determine which current and former recipients were members of the *Baldwin* class and which of those class members would wish to exclude a child receiving support payments if that option becomes available. In the event that 42 U.S.C. § 602(a)(38) is ultimately held to be unconstitutional, applicant will be in a position to make changes expeditiously to these AFDC cases. Therefore, members of the respondent class have not been led to believe that cases will be changed immediately.

Applicant is mindful that this Court is understandably reluctant to grant a stay pending appeal where to do so would be to substitute a single Justice's view for that of a tribunal that is "closer to the relevant factual considerations that so often are critical to the proper resolution of these questions." *Times-Picayune Publishing Corp. v. Schulingkamp,* 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers). However, in this case, the facts are undisputed and a clear question of law is presented to the Court. It is clear in a careful reading of the district court's order denying the motion for stay that the court's decision did not turn on an analysis of the particular factual circumstances of these respondents, but on the court's subjective (and Applicant submits erroneous) view of the takings

clause and substantive due process analysis. See Attachment "D" at 5, relying on previous order, Attachment "A" at 33-35. It is further submitted that the district court's decision to deny a stay is only very loosely tied to any facts in the case. Consequently, this case is a more appropriate case for the granting of a stay by the Court than are cases in which the lower court's denial of a stay pending appeal is inextricably entwined in the facts of the case.

IV. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that this Court stay the orders of the district court issued October 17, 1986 and November 18, 1986 pending the appeal of this case.

Respectfully submitted,

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Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

/s/ William C. Joy
Senior Assistant Attorney General

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing APPLICATION FOR STAY ON APPEAL, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 10th day of December, 1986.

/s/ William C. Joy
Senior Assistant Attorney General

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-448

JAMES D. LEDBETTER, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES,

Appellant,

v.

VERNITA BALDWIN, ET AL.

ORDER

(Filed December 12, 1986)

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the judgment of the United States District Court for the Northern District of Georgia, case No. C85-4340A, entered on October 17, 1986, and the order entered November 18, 1986, are stayed pending receipt of a response due by the close of business on Wednesday, December 17, 1986, and further order of the undersigned or of the Court.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 12th
day of December, 1986.

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-448

JAMES D. LEDBETTER, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES,

Appellant,

v.

VERNITA BALDWIN, ET AL.

ORDER

(Filed December 18, 1986)

UPON FURTHER CONSIDERATION of the application of counsel for the appellant, and the response filed thereto,

IT IS ORDERED that the order entered December 12, 1986, in the above-entitled case is continued pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the Northern District of Georgia is affirmed, this order is to terminate automatically. In the event that the judgment is vacated or reversed or that jurisdiction is noted or postponed, this

order is to remain in effect pending the sending down of the judgment of this Court.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of December, 1986.

SUPREME COURT OF THE UNITED STATES

No. A-448

JAMES D. LEDBETTER, COMMISSIONER, GEORGIA DEPT. OF HUMAN RESOURCES v. VERNITA BALDWIN Et Al.

On Application for Stay

[December 18, 1986]

Justice Powell, Circuit Justice.

The applicant in this case is the Commissioner of the Georgia Department of Human Resources. He promulgated regulations implementing 42 U. S. C. § 602(a)(38) (Supp. III 1985). That section alters the requirements for state plans distributing grants under the Aid to Families with Dependent Children program (AFDC). Generally, § 602(a)(38) requires the States, in determining a family's need for AFDC payments, to consider child support payments made to certain children living with the family. Respondents filed suit in the United States District Court for the Northern District of Georgia, contending that applicant's regulations violated the federal Constitution in two respects: the regulations took property from the children without just compensation and violated substantive due process. The District Court held in favor of respondents and declared the regulations unconstitutional. Applicant sought a stay pending appeal from the District Court. Before the District Court ruled on that motion, applicant filed a notice of appeal in this Court pursuant to 28 U. S. C. §§ 1252 and 2101. Subsequently, the District Court denied applicant's request for a stay.

Three considerations govern a Justice's decision whether to grant an application for a stay pending appeal. First, there must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious to justify notation of probable jurisdiction. Second, there must be a significant possibility of reversal of the lower court's decision. Finally, there must be a likelihood that irreparable harm will result if the lower court's decision is not stayed. See *Times-Picayune Publishing Co. v. Schulingkamp*, 419 U. S. 1301, 1305 (1974) (Powell, J., in chambers); *Graves v. Barnes*, 405 U. S. 1201, 1203-1204 (1972) (Powell, J., in chambers).

Respondents concede that the case raises an issue sufficiently meritorious for the Court to note probable jurisdiction. On December 8, the Court noted jurisdiction in the similar case of *Kirk v. Gilliard*, No. 86-509 (on appeal from *Gilliard v. Kirk*, 633 F. Supp. 1529 (WDNC 1986)). My review of the papers filed with this application and in No. 86-509 convinces me that there is a significant possibility that the Court will reverse the lower court's decision in this case. Finally, the State will suffer irreparable harm if the decision is not stayed. The State will bear the administrative costs of changing its system to comply with the District Court's order. Even if this Court reverses the judgment of the District Court, it is unlikely that the State would be able to recover these costs. Similarly, it is unlikely that disputed payments made pursuant to the District Court's judgment could be recovered. On the other hand, respondents argue that they will suffer irreparable injury if a stay is issued. If the Court affirms the judgment of the District Court, a stay will have deprived them

of the disputed payments during the period of the Court's consideration. If the State then pays the disputed amount with interest, as presumably it would, this may not fully compensate respondents for the difficulties caused by interruption of their income. Although respondents' argument has some force, I conclude that the balance of irreparable injuries, coupled with the likelihood of reversal on the merits, supports a stay.

The application is granted.